

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 309

WILLIAM H. DANFORTH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 11,255
AT LAW.

WILLIAM H. DANFORTH, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 15, 1938.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1939, of said Court, before the Honorable John B. Sanborn, and the Honorable Seth Thomas, Circuit Judges and the Honorable George F. Sullivan, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the fifteenth day of July, A. D. 1938, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein William H. Danforth was Appellant and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(Citation and Service.)

(Filed February 26, 1938.)

The United States of America

to United States of America—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri, forty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein William H. Danforth is appellant in error, and you are appellee to show cause, if any there be, why the judgment rendered as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties that behalf.

Witness, the Honorable, Judge of the District Courts of the United States for the Eastern District of Missouri, this 26th day of February, in the year of our Lord one thousand nine hundred and Thirty-eight.

CHARLES B. DAVIS,
United States District Judge, for
the Eastern District of Missouri.

Copy received February 26, 1938.

HERBERT H. FREER,
Assistant United States Attorney.

L. JOHN WEBER,
Special Attorney, Department of Justice.

Endorsed: Filed in U. S. District Court on February 26, 1938.

2

DANFORTH VS. UNITED STATES OF AMERICA

3

United States District Court for the Southeastern
Division of the Eastern Judicial District of
Missouri.

United States of America, Plaintiff,
No. 716. vs. At Law.

Beatrice McDaniel, William H. Danforth, Wilbur E. Hoag,
as Trustee for the Northwestern Mutual Life Insur-
ance Company, et al., Defendants.

Tract No. 243.

Be It Remembered, that heretofore, to-wit; on the 11th
day of April, 1938, there was filed in the office of the Clerk of
said Court in the above entitled cause, a certain praecipe for
transcript on appeal from said Court to the United States
Circuit Court of Appeals for the Eighth Circuit, which said
matters as set out in said praecipe, except as herein noted, to-
gether with such papers as have been filed in said cause since
the filing of said praecipe and as requested by the attorney
for the appellant be [includ] in said transcript, are as fol-
lows, to-wit:

4

Petition.

Filed September 25, 1933.

Tracts Nos. 282, 306, 246, 256, 259, 266, 250, 347, 247, 187, 281
and 243.

In the United States District Court, Eastern District of Mis-
souri, Southeastern Division.

United States of America, Plaintiff,
Docket No. 716. vs.
Beatrice McDaniel, Poplar Bluff, Missouri;

.

7

William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mu-
tual Life Insurance Company, a corporation, in
a certain deed of trust dated May 28, 1920 and
filed June 8, 1920 in book 69 at page 118 of the
records of Mississippi County, Missouri, and
given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corpora-
tion, as cestui que trust in the above mentioned deed
of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

10

Defendants.

The United States of America, the plaintiff herein, by Louis H. Breuer, United States Attorney for the Southeastern Division of the Eastern Judicial District of Missouri, for the cause of action alleges that the plaintiff herein, the United States of America, is and at all times and dates hereinafter mentioned was a corporation sovereign; that the defendants herein are the owners of the real estate in this petition described, and have an interest therein as herein set out, and have claims thereupon either as tenants, mortgagees or bondholders, secured by mortgage or deed of trust upon the said premises, and by special tax liens by levee and drainage districts.

2.

That the real estate as hereinafter described is located within the State of Missouri, and within the jurisdiction of

the United States District Court, in and for the Eastern District of Missouri, Southeastern Division.

3.

That this is an action having for its purpose, among other things, the acquiring by condemnation, of a perpetual easement over and across certain real estate located as in this petition described and is authorized and directed to be brought by the Secretary of War, pursuant to the act of May 15, 1928, known as "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes."

4.

That the project herein referred to and the matters to be performed, being in the interest of national prosperity, the flow of interstate commerce, and the movements of the United States mails, and the conserving and controlling of flood waters of a volume and flowing from a drainage area largely outside of the states most affected in the alluvial valley of the Mississippi, the jurisdiction and control of the subject matters herein are within the purview of the sovereign plaintiff and the Congress of the United States.

12

5.

That on the 15th day of May, 1928, an Act entitled, "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", became effective as a law of the United States, and was designated as Chapter 569 of the United States Statutes for 1927-28; that said Act included as a part thereof and incorporated therein the following:

6.

"That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers," subject to certain exceptions and limitations in said Act prescribed.

7.

That the said project for flood control of the Mississippi River above referred to, in accordance with the engineering

plan set forth and recommended by the Chief of Engineers in said report submitted to the Secretary of War, under date of December 1, 1927, was thereafter approved by said Secretary of War, and was adopted and incorporated in said act of May 15, 1928, Chapter 569, Which Plan Contemplates And Provides For, among other things, the construction of levees and the Acquisition Of Flowage Rights For Additional Destructive Flood Waters that will pass by reason of diversions from the main channel of the Mississippi River; the acquisition of such flowage rights by purchase or condemnation; for the lowering of the present river bank levee to a grade equal to the flow line of fifty-five feet on the Cairo gauge, beginning at a point approximately one mile East of the highway bridge, Birds Point, and thence South about eleven miles, so that when the stage at Cairo reaches fifty-five feet, water from the main channel of said river will be permitted to pass over or through said river bank levee at the point above named and overflow the land, and through the territory embraced between the present river side levee on the East, as now constructed, and the levee in process of construction from the vicinity of Birds Point, Southwest to St. Johns Bayou, just East of New Madrid on the West, known as the set-back levee, and thence again into the main channel of said river; that the territory above described and embraced between the aforesaid levees is designated as the Floodway Area; that although the said Floodway Area will be subjected to the servitude above described, the land in the said Floodway Area between the new levee and present river bank levee, other than the back water area of St. Johns Bayou, will be protected against all stages of record except those of 1927; that said Area is more definitely defined, described and shown by maps, plats and charts heretofore filed with the Clerk of this Court and to which reference is herein had, and made a part hereof as if specifically attached hereto; that reference to the same is had in House Document 90, and was specifically designated by the Chief of Engineers and such designation approved by the Secretary of War and confirmed by executive order of the President of the United States; that the frequency and duration of such flow of water as well as the depth thereof on the specific land hereinbefore described, at the time of such overflow, this plaintiff is unable to state.

8.

That for the purpose of carrying that part of the project into effect dealing with the diversion of the additional flood

14 water from the main channel of the Mississippi River as contemplated by House Document 90 and provided for in Chapter 569 above referred to, it is essential that the plaintiff herein acquire a full, complete and perpetual right, power easement, and privilege to overflow, as contemplated by said project, and as described in House Document 90, the above designated flood area, of which the lands herein described form a part thereof; that the said lands and territory necessary for the purpose aforesaid are located in certain parts of Mississippi and New Madrid Counties, Missouri, and within the jurisdiction of this Court.

9.

That the said proposed floodway as designed and herein described is upon, over and across lands not now owned or controlled by this plaintiff, but owned and controlled by many and sundry individuals, persons, firms and corporations, and located within the State of Missouri and within the jurisdiction of this Court; that the Secretary of War is empowered and authorized to institute or cause to be instituted such proceedings as may be necessary to Acquire Said Easement for the completion of said project, and that this Court has jurisdiction of all proceedings, suits or actions designated and intended for such purposes.

10.

That the Following Lands hereinafter described in this petition, and as described, are included within the aforesaid territory; and that it is the opinion of the Secretary of War and the Chief of Engineers that it is necessary and advantageous to the interests of this sovereign plaintiff and the carrying into effect of the aforesaid Act that flowage rights over said lands be acquired by condemnation as provided by law; that said land is bounded and described as follows:

34

—10 z (35)—

Also, Tract No. 243, being designated as Parcel D of Exhibit 1, hereto attached, to-wit:

(see next page for description of land)

35

Description.

243 Floodway.

A tract of land lying wholly within Sections 22 and 27, T. 25 N., R. 16 E., of the 5th Principal Meridian, Mississippi County, Missouri, as shown on the plat, and being more particularly described as follows:

The east half of the said section 22, and the east half of the said section 27, containing 640 acres, more or less;

The part of the west half of the said section 22, and the part of the west half of the said section 27, lying southeast of the Birds Point-New Madrid Floodway levee right of way, and being more particularly described as follows: Beginning at a point "A", the said point "A" being the southeast corner of the southwest quarter of the said section 27; thence along the south line of the said southwest quarter of the said section 27, South $89^{\circ} 29'$ West, 2142.5 feet to point "B", the said point "B" being on the southeast boundary line of the said Floodway levee right of way; thence along the said boundary line, North $0^{\circ} 30'$ East, 714.7 feet to point "C"; thence along the said boundary line, North $89^{\circ} 30'$ West, 65.0 feet to point "D"; thence along the said boundary line, North $0^{\circ} 30'$ East, 1806.5 feet to point "E"; thence along the said boundary line, North $89^{\circ} 37\frac{1}{2}'$ West, 20.0 feet to point "F"; thence along the said boundary line, North $0^{\circ} 15'$ East, 2262.7 feet to point "G"; thence along the said boundary line, North $20^{\circ} 02'$ East, 446.7 feet to point "H", the said point "H" being on the south line of the said west half of the said section 22, and being North $89^{\circ} 27'$ East, 562.0 feet from the southwest corner of the said section 22; thence along the said boundary line, North $20^{\circ} 02'$ East, 686.0 feet to point "I"; thence along the said boundary line, South $69^{\circ} 58'$ East, 145.0 feet to point "J"; thence along the said boundary line, North $20^{\circ} 02'$ East, 1162.7 feet to point "K"; thence along the said boundary line, North $11^{\circ} 59'$ East, 3636.5 feet to point "L", the said point "L" being on the north line of the said west half of the said section 22; thence along the said north line of the west half of the said section 22, South $89^{\circ} 43\frac{1}{2}'$ East, 490.4 feet to point "M", the said point "M" being the northeast corner of the said west half of the said section 22; thence along the east line of the said west half of the said section 22, South $0^{\circ} 09'$ East, 5250.0 feet to point "N", the said point "N" being the northeast corner of the said west half of the said section 27; thence along the east line of the said west half of the said section 27, South $0^{\circ} 09'$ East, 5176.9 feet, more or less, to the point of beginning; the said part of the said west half of the said section 22, and the said part of the said west half of the said section 27, containing 393.56 acres, more or less.

There is excepted a ditch easement for right of way of Lat. #2 of D. D. #23 over 19.85 acres, more or less, and also a County road easement for right of way over 11.02 acres,

more or less; the said tract containing 1033.56 acres, more or less.

The bearings of boundaries in this description are referred to true North.

36

—10 z (36)—

That the said land is more definitely described and located by blue prints attached hereto, and made a part of this petition, and filed herewith;

—10 z (38)—

That the defendant William H. Danforth claims some title or estate in and to said Tracts Nos. 187, 281 and 243, as record owner of said real estate;

—10 z (39)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant, the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is
37 unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the southeast quarter, and the fractional east half of the southwest quarter, and the fractional southwest quarter of the southwest quarter of Section 22, T. 25 N., R. 16 E., 5th P. M. Mississippi County, Missouri;

—10 z (40)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the northeast quarter, and the fractional east half of the northwest quarter, of Section 22, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

—10 z (41)—

That the defendant Wilbur E. Hoag is named as trustee for the defendant Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June

14, 1920 and filed June 24, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the fractional north half of Section 27, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

—10 z (42)—

38 That the defendant Wilbur E. Hoag is named as Trustee for the defendant North Western Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00; that the said deed of trust is unreleased of record and stands as a lien upon that portion of said Tract No. 243, to-wit, the fractional south half of Section 27, T. 25 N., R. 16 E., 5th P. M., Mississippi County, Missouri;

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12.

That the plaintiff herein and the defendants and each of them, as owners, claimants and lessees of the property hereinbefore described, have been unable to agree upon the compensation to which said owners, claimants and lessees would be entitled for the use to which the said premises hereinbefore described would be subjected or to amicably settle upon such compensation, and that it is necessary to proceed by condemnation as by law provided to acquire the interest sought to be acquired by these proceedings.

13.

Wherefore Plaintiff prays that this Court direct the Clerk thereof to issue process, summons and notice for the defendants hereinbefore named and for the Order of the Court directing notice of suit and publication thereof to the unknown persons, defendants herein, all as by law required, giving them notice of the time when and the place where this petition will be heard, and for such further order and decree as may be proper and necessary; and that the Court at such time and place will decree to this plaintiff the right of judgment in condemnation herein, decreeing to the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above described land as hereinbefore in this petition set out, in connection with the maintenance

and operation of the aforesaid floodway; and that the said defendants and each of them, and all other claimants, be required to show cause on the day herein fixed, why the said plaintiff should not have the relief herein prayed for; and that at said time and place the said Court will appoint three disinterested Commissioners, qualified by law, to determine, assess and award damages sustained by said defendants by virtue of the easement, servitude and overburden to which the said premises herein described shall be subjected
 61 and as hereinbefore described; and that said Commissioners will assess, according to the provisions of the Acts and the provisions of law applicable thereto under which this action is brought, the benefits, if any, which might be sustained by said defendants; and that the said plaintiff shall have free access to said property for the purpose hereinbefore stated and decreed, a perpetual easement over and across said premises, and that this Court will make such necessary orders as in the premises shall be just, proper, necessary and requisite, and for such other and further relief therein to which this petitioner may be found entitled.

LOUIS H. BREUER,
 BRYAN PURTEET,

Attorneys for Plaintiff.

62 State of Missouri,
 City of St. Louis—~~sh~~:

Bryan Purteet, being duly sworn upon his oath, deposes and says that he is Assistant to the United States District Attorney for the Eastern District of Missouri, Southeastern Division, and as such, with said District Attorney, is attorney for the United States of America in the above entitled action;

That he has read the foregoing petition for the condemnation of flowage rights over certain real estate in said petition described, and that all the statements contained therein are true and correct to the best of his understanding, knowledge and belief.

BRYAN PURTEET.

Subscribed and sworn to before me, this the 22nd day of
 September 1933.

(Seal)

JAS. J. O'CONNOR,
 Clerk U. S. District Court.

Indorsed: Filed Sept. 23, 1933, Jas. J. O'Connor, Clerk.
 Attest: A true Copy.

JAS. J. O'CONNOR,
 Clerk.

63 Interlocutory Order and Order Appointing Commissioners.

(Filed Feb. 7, 1934.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Docket No. 716 vs.
Beatrice McDaniel, Popular Bluff, Missouri;

• • • • •

66 William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

69

Defendants.

70 Now on this, the 7th of Feb., 1934 comes the above named plaintiff, the United States of America, by its attorneys, Louis H. Brener, Esquire, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and Claud Crooks, Esquire, Assistant to the said United States Attorney, and presents its petition, duly verified, which action has for its purpose the decreeing by judgment in condemnation to the plaintiff the full, complete and perpetual right, power and privilege to overflow the lands described in said petition, by diversion of excessive flood waters from the main channel of the Mississippi River, when and as in said petition described, and in accordance with the provisions of the act of Congress of May 15, 1928.

And it appearing to me, and I so find, that the persons named as defendants herein have, each and all, been properly and legally served with summons and notice, in the way and manner and within the time provided by law, directing them and each of them to appear and answer before the undersigned Judge of the United States District Court at the court room in the United States District Court House in the City of Cape Girardeau, in the State of Missouri, at the time heretofore fixed by this court, and to-wit, on the 7th of Feb., 1934 and said cause now comes on for hearing at the said place where and at the time when, by said summons and notice and order of publication said proceedings were made returnable.

The plaintiff-condemnor appearing by its attorneys as aforesaid, and the defendants, and each of them, although legally summoned come not, and are each and all in default, except:

and being fully advised in the premises, I do find the issues and each and all of them in favor of the plaintiff-condemnor;

I further find that this court and the judge thereof has jurisdiction over the subject matter of the petition and each and all of the defendants named in said petition as defendants;

That the order of publication heretofore entered in this cause recites in substance the allegations of the petition; that said order of publication notifies all the defendants of the institution and pendency of this suit and of the time and place of the hearing and trial thereof, and of the property involved, and that such order has been published once a week for three consecutive weeks in the East Prairie Eagle, a weekly newspaper published and printed in Mississippi County, Missouri; the last insertion in said publication having been more than ten days before the day set for the hearing of this cause; that proof of publication has been duly made and filed as part of the record herein and is in due form;

That said defendants, one or all, claim the title to said premises, or some interest therein, or lien thereon;

That the land described in said petition and in the notice and order of publication is located in:

Mississippi County,

State of Missouri, and within the Southeastern Division of the Eastern Judicial District of Missouri;

71 That the use for which the said plaintiff-condemnor desires and seeks to acquire said easement from said defendants is a public use, and that the plaintiff-condemnor is entitled to condemn said tract of land to acquire said easement, for the purpose defined and described in said petition, as authorized, defined and prescribed by the act of Congress of May 15, 1928;

That as a part of the project as provided for by the act of Congress of May 15, 1928, Chapter 569, it is necessary to acquire a perpetual easement and privilege to overflow certain lands known as the floodway area, by diverting thereon, excessive flood waters from the main channel of the Mississippi River; that the said area and project are more definitely defined and described by maps, plats and charts heretofore filed with the Clerk of this Court, and within the jurisdiction thereof, and to which said maps, plats and charts reference is hereby made;

That this action is instituted by the Attorney General of the United States, at the request of the Secretary of War, as by statute provided, and under authority of the Act of Congress of May 15, 1928, Chapter 569, and other acts;

That the following lands hereinafter described, and as described, are included within the aforesaid floodway area; and that it is the opinion of the Secretary of War and the Chief of Engineers that it is necessary and advantageous to the interests of this sovereign plaintiff and the carrying into [affect] of the aforesaid Act that flowage rights over said lands be acquired by condemnation as provided by law; that said land is bounded and described as follows:

77 " That the said plaintiff-condemnor is lawfully entitled to acquire said easement over said property, and that the said defendants are entitled to have an assessment of compensation and for damages, if any, which shall be paid by said plaintiff-condemnor to said defendants; also to have the benefits fixed, determined and assessed, if any, because of the use of said lands for the purposes in said petition described;

That the plaintiff-condemnor has endeavored to agree with the defendants concerning the compensation that shall be paid said defendants, as their interests may appear, for the above described easement, and that said plaintiff-condemnor and said defendants have not been able to and cannot agree in regard to said compensation to be paid by the plaintiff-condemnor for the purpose and on account of the matters aforesaid;

Wherefore, it is ordered that Messrs. E. P. Deal, E. C. Davis, and R. L. Shelby, three disinterested freeholders, residents of Mississippi County, Missouri, and being otherwise qualified by law to act, be and the same are hereby appointed commissioners to view the said premises for the purpose of ascertaining and assessing the compensation to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein; also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay; and

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, South-

eastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

It is further ordered that said commissioners shall receive as their compensation and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each, for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

C. B. FARIS,
U. S. District Judge.

Dated this, the 7th day of February, 1934.

Endorsed: Filed Feb. 7, 1934. Jas. J. O'Connor, Clerk.

Commissioners' Report.

Filed May 4, 1934.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716 vs.
Beatrice McDaniel, et al., Defendants.

To the Judge and Clerk of the United States District Court,
Eastern District of Missouri, Southeastern Division:

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern District of Missouri, Southeastern Division, on the 7th day of Feb., 1934, to view the lands hereinafter described and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commissioners being resident freeholders of Mississippi County, State of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because

of the aforesaid action, and that the description of the premises is as follows:

79 Clerk's Note: Heretofore described at marginal page 35 of this printed record.

That we hereby assess damages for Tract No. 243 in the sum of \$20409.90; That we hereby assess benefits for Tract No. 243 in the sum of \$.....

80 That because of the conflicting interests of such parties, your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, E. P. Deal, E. D. Davis and R. L. Shelby as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

(Seal)

E. P. DEAL
E. C. DAVIS
R. L. SHELBY

Commissioners.

Subscribed and sworn to before me this 4th day of May 1934.

JAS. J. O'CONNOR

Clerk of the U. S. District Court.

Filed May 4, 1934 Jas. J. O'Connor, Clerk

81 (Exceptions of Plaintiff to Report of Viewers.)

(Filed May 9, 1934.)

Comes now the plaintiff and excepts to the findings of the viewers heretofore appointed by the Court to view the property described in the petition filed in this cause, and files its said exceptions with the Clerk of this Court. The plaintiff excepts to the following items contained in the said viewers' report, to wit:—the damages assessed for Tracts Nos. 243, 250, 259, 281, 282, 306 and 347 for the following reasons among others, to-wit:

That the amount found as assessed damages alleged to have been suffered by the defendants because of the con-

demnation of an easement for flowage rights over said property described in said condemnation suit as Tracts Nos. 243, 250, 259, 281, 282, 306 and 347 is excessive, exorbitant, and inconsistent with the facts;

That the said findings are inconsistent with the findings in other cases under the same state of facts and conditions in proceedings of like nature concerned in the levee and floodway project described in the petition;

That the findings are against the weight of evidence;

That the said viewers failed to find and failed to consider any element of benefit because of the construction of such project, when in fact said defendants do derive benefit thereby; that said elements of benefit were ignored by said viewers;

That the said viewers placed an excessive and exorbitant value upon the real estate condemned;

That the said viewers failed to be governed by the law in such cases made and provided in that they failed to value said premises according to the market value thereof at the time of filing the said petition, or at the time of making said report;

82. That the value of the improvements placed upon said premises is in excess of their actual value and that the damages allowed therefor are in excess of what will be sustained to said improvements;

That the findings are indefinite and uncertain and that the plaintiff is not definitely and adequately informed as to the nature of the damages to said premises and improvements thereon, and the manner in which such damages apply and how applied;

That the said viewers have considered elements of damage such as speculative or resale values, contrary to law;

That the said viewers have proceeded upon the theory that the condemnor is liable for damages resulting from overflow of the lands under condemnation, from crevasses in said riverside levee at points other than at the point designated as the fuse plug section, which is contrary to the letter and spirit of the Floodway Act, and for damages resulting from the overflow from said Mississippi River upon the said lands occasioned by other than the acts of this con-

demnor in diverting excessive flood waters from said river, to all of which the condemnor excepts;

That in arriving at the designated amount fixed by the report as damages, the said viewers have wholly failed to consider the periods or frequency of such overflow that would be due directly to the operation of the project as defined in the petition;

That they have failed or refused to follow or be guided by the instructions of the Court;

That the said viewers were and are actuated and [governed] in their findings by bias and prejudice against this sovereign plaintiff and the said project, and are partial to and in behalf of the person or persons owning the premises described in their said report;

That because of the foregoing assignments together with others not herein stated, the plaintiff herein asks the Court to vacate, set aside and hold for naught, the said findings, as unwarranted in law and not authorized by the facts existing in the premises; and plaintiff asks that it be heard in support of these objections, and upon the hearing of same, that this Court will make such order herein as right and justice require.

HARRY C. BLANTON

Attorneys for Plaintiff.

Dated this, the 7th
day of May, 1934.

In forced: "Filed May 9-1934 Jas. J. O'Connor, Clerk."

83 (Exceptions of Defendant, William H. Danforth,
to Report of Viewers.)

(Filed June 4, 1934.)

Now comes William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of E. P. Deal, E. C. Davis and R. L. Shelby, Commissioners in the above entitled condemnation suit, which commissioners were duly appointed by the United States District Court, South-eastern Division of the Eastern Judicial District of Missouri, for the reason that the damages awarded this defendant by said commissioners in the sum of Twenty Thousand Four Hundred Nine Dollars and Ninety Cents (\$20,409.90) are wholly inadequate and are not fair and just compen-

sation for the properties taken or properties affected and damaged by the flowage rights demanded and required by plaintiff over this defendant's land.

This defendant further states that he is the owner of a contiguous body of land consisting of approximately one thousand thirty-three and fifty-six [hundreds] (1,033.56) acres, described as follows, to-wit:

84

Clerk's Note: Heretofore described at marginal page 35 of this printed record.

85

The said defendant, William H. Danforth, further objects and excepts to the said award:

1. Because the said Commissioners, and each of them, used improper principles on which they based their findings and made their award, were without jurisdiction or power to render an award; and the plaintiff and defendant, William H. Danforth, reached an accord as to the damages and made a written contract prior to appointment of the said commissioners and prior to the filing of the said award, under the terms of which contract the said plaintiff and said defendant, William H. Danforth, agreed upon settlement for the damages to Tract No. 243 on the sum of \$31,681.98, which should be paid into Court by plaintiff under the law and under said contract of settlement.

2. Because the said Commissioners were biased and prejudiced in favor of the Government.

3. Because the said flowage would cause damage to the whole tract and would destroy a large part of the same.

4. Because the said Commissioners gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said Commissioners.

5. That the award of the said Commissioners is improper in form as well as in substance.

6. That the said Commissioners failed to take into consideration, in arriving at their said award, proper legal and just elements of damage.

7. That the award of the commissioners is based upon speculation.

Wherefore, This Defendant prays that the award of the commissioners be set aside, and that new commissioners be

appointed in accordance with the law, and for such other and further relief as to the Court may seem meet and proper.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON
Attorneys for Defendant,
William H. Danforth.

86 (Order granting leave to William H. Danforth,
to file Answer and Cross-Bill.)

(Filed July 5, 1934.)

Upon oral request of defendant, William H. Danforth, through counsel, the said defendant is granted leave to file answer and cross-bill or other pleading.

C. B. FARIS,
Judge.

Endorsed: Filed July 5, 1934, Jas. J. O'Connor, Clerk.

87 Application for Dedimus to Take Depositions.

Filed Aug. 25, 1934

Comes now William H. Danforth, one of the defendants in the above entitled cause and respectfully represents to the Court that heretofore on the 15th day of August, 1934, said defendant, through his attorneys, caused to be served upon plaintiff's attorneys of record herein a notice in writing that depositions of witnesses to be read in evidence in the above entitled cause would be taken by said defendant at the office of Covington, Burling & Rublee, Attorneys, Union Trust Building, Washington, D. C. on the 30th day of August, 1934;

Said defendant further states that the testimony of the witnesses whose depositions said defendant intends to take under said notice is indispensable in the defense of this cause.

Wherefore, the premises considered, said defendant prays that the Court order a dedimus to issue, directed to any Notary Public, or to any Judge, Justice of the Peace, or other judicial officer of the District of Columbia, authorizing said Notary Public, Judge, Justice of the Peace, or other judicial officer of the District of Columbia to cause to come before him such person or persons as shall be named

to him by said defendant herein for the purpose of giving their testimony under the notice hereinbefore mentioned.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON

Attorneys for Defendant,
William H. Danforth.

88 State of Missouri.
City of St. Louis—ss.

J. L. London, of lawful age, being duly sworn, on his oath states that he is agent and attorney for William H. Danforth, defendant herein, and as such is duly authorized to make this affidavit, and upon his oath states that the matters and things stated in the foregoing petition are true according to his best knowledge, information and belief.

J. L. LONDON

Subscribed and sworn to before me this 20th day of August, 1934.

My commission expires:

LILIE A. WOLF

(Seal)

Notary Public within and for
the City of St. Louis, Missouri.

Application ordered as prayed:

C. B. FARIS, Judge.

Endorsed: Filed Aug. 25, 1934. Jas. J. O'Connor, Clerk.

89 (Answer and Counterclaim of William H. Danforth.)

(Filed September 10, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

Tracts Nos. 243 and 281.

Now comes William H. Danforth and for his answer, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now

pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further ansywer, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933 in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98. for the perpetual flowage easement over tract No. 243 and in the amount of 90 \$2208.94 on tract No. 281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

Further answering, the said defendant William H. Danforth specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further stated that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing to plaintiff the full, complete and perpetual right, power and privilege to over-

flow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the said plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums.

Now comes William H. Danforth and for his counterclaim, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further counterclaim, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933 in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over Tract No. 243 and in the amount of \$2208.94 on Tract No. 281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

93 For further counterclaim, the said defendant, William H. Danforth, specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the

maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of 94 - \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights, and interest; and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums.

LEAHY, SAUNDERS &
WALTHER, &

J. L. LONDON,

Attorneys for Defendant.

Endorsed: Filed Sept. 10, 1934. Jas. J. O'Connor, Clerk.

95 (Stipulation Extending Time for Taking Depositions, etc.)

(Filed September 21, 1934.)

It is hereby stipulated and agreed this 30th day of August, 1934, by and between the parties hereto by their respective attorneys, as follows:

1. The taking of the depositions of witnesses to be read in evidence in the above entitled cause on the part of defendant William H. Danforth is hereby continued from the 30th day of August, 1934, as stated in the Notice to Take Depositions heretofore served upon the plaintiff's attorney by the attorney for defendant William H. Danforth, to the 7th day of September, 1934, at ten o'clock A. M., at the law offices of Covington, Burling, Rublee, Acheson & Shorb, Room 701, Union Trust Building, Washington, D. C.

2. The photostatic copies or duplicates thereof of any or all documents used in the case of United States vs. Frances-Ralph Realty Company, No. 584, in the District Court of the United States for the Eastern District of Missouri, South-eastern Division, may be used in this case in lieu of the originals of said documents, and the production of the originals of said documents in this case is hereby dispensed with.

96 And it is further agreed that the signatures on said photostatic copies or duplicates thereof are authentic reproductions of the original signatures of the persons by whom said documents purport to have been signed, and the plaintiff hereby waives further proof of the authenticity of said signatures.

The foregoing is subject to the rights of plaintiffs to object to depositions, exhibits or documentary evidence:

(1) Upon the ground of competency, relevancy or materiality.

(2) That the right is reserved by the plaintiff to first make investigation and examination of the original signatures and to ascertain their authenticity before agreement is made to use copies instead of originals.

The purpose of this stipulation is in no manner to admit by plaintiff the admissibility of any depositions or documents offered, or the right to offer the same in this case, or in any manner to consider that such depositions or documents have any probative force or tend to prove any issues in this case.

and that the sole and only purpose of this stipulation is to dispense with foundation proof.

Signed this 6th day of September, 1934.

For the Attorney General,

HARRY W. BLAIR,
Assistant Attorney General.

J. L. LONDON,
Attorney for Defendant William
H. Danforth.

Filed: Sept. 21, 1934. Jas. J. O'Connor, Clerk. (Attached to deposition.)

97 (Motion of Plaintiff to strike Answer and Counterclaim of William H. Danforth, etc.)

(Filed October 8, 1934.)

Comes now the plaintiff, the United States of America, through and by its attorneys of record, Harry C. Blanton, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and L. John Weber, Special Assistant to the aforesaid District Attorney, and John C. Dyott, Esquire, Special Counsel with the United States War Department, Corps of Engineers, and moves the Court as follows:

First: To strike the entire alleged answer and counterclaim of defendant, William H. Danforth, as to Tracts Nos. 243 and 281 heretofore filed in Case No. 716 on the 10th day of September, 1934, for the reason that the said alleged answer and counterclaim were filed out of time and after an interlocutory judgment of condemnation had been entered in this cause on, to-wit, February 7, 1934, and after the October term, 1933, of this court;

98 Second:

(A) To strike the entire alleged answer of defendant, William H. Danforth, as to tracts Nos. 243 and 281 in Case No. 716 beginning on page one and through line three on page four of the alleged answer and counterclaim heretofore filed in said Case No. 716 on September 10, 1934, the portion hereby moved to be stricken reading as follows:

"Now comes William H. Danforth and for his answer, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as

set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further answer, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933, in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for the damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over tract No. 243 and in the amount of \$2208.94 on tract No. 281.

That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932, in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

Further answering, the said defendant William H. Danforth specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

99 The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing to plaintiff the full, complete and perpetual right, power and

privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the said plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sum of \$31,681.98, covering Tract No. 243 and for \$2208.94, covering Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts upon payment into Court of the said sums.

100 for the reason that, if the facts in said portion hereby moved to be stricken are as alleged by defendant, William H. Danforth, the same have been waived by said defendant because of his failure to plead the same prior to the entry and findings of the Court as set out in the interlocutory judgment made and entered in this cause on February 7, 1934, and, for the further reason in any event, if the facts in said portion hereby moved to be stricken are as alleged

by defendant, the same have been waived by the defendant's failure to plead the same before the expiration of the October Term, 1933, of this court;

(B) To strike out the entire alleged counterclaim of defendant, William H. Danforth, as to tracts Nos. 243 and 281 in Case No. 716 beginning on page four in line four thereof and through page six of the alleged answer and counterclaim heretofore filed in said Case No. 716 on September 10, 1934, the portion hereby moved to be stricken reading as follows:

"Now comes William H. Danforth and for his counterclaim, filed by leave of Court to the petition heretofore filed by the plaintiff, states that he is the owner of Tracts Nos. 243 and 281 as set out in the plaintiff's petition in said cause No. 716, now pending in this Court, which Tracts are correctly described in plaintiff's petition.

For further counterclaim, said defendant states that the petition filed in this case by the plaintiff was filed on or about the 22nd day of September, 1933, in this Court for the purpose, as therein alleged, of condemning easements for flowage rights over the said two tracts of land. The plaintiff further states that prior to the filing of said suit by the said plaintiff, the United States of America, the plaintiff and the defendant entered into a written contract covering the said two tracts of land, whereby the plaintiff made a written offer of settlement for damages and for the purchase of an easement over the said tracts for floodway purposes, which said offers were duly accepted in writing by this defendant. That the said parties expressly fixed and agreed upon the extent of damages in the sum of \$31,681.98 for the perpetual flowage easement over Tract No. 243 and in the amount of \$2208.94 on Tract No.

281. That the said offers on the said two tracts of land were made by the plaintiff on or about the 14th day of January, 1932 in a letter dated January 14, 1932, the plaintiff granting the said defendant the time for acceptance until March 15, 1932. That thereafter, on or about the 2nd day of March, 1932, the said defendant duly accepted, in writing, the said offers of the plaintiff on the said two tracts of land.

For further counterclaim, the said defendant, William H. Danforth, specifically denies the averment in the plaintiff's petition that the said defendant and the plaintiff were unable to agree upon the compensation or damages to which the owner would be entitled for the use to which the premises described in the said petition will or may be subjected, and specifically denies that they were unable to amicably settle

or agree upon the extent of the damages or the value of the easement for flowage purposes, as set out in plaintiff's petition.

The said defendant further states that in the offers made by the plaintiff, covering the said two tracts of land, it was expressly set out that the only purpose of filing a condemnation suit would be to clear the title through a friendly judgment to be based upon an agreed verdict. Instead, the plaintiff's petition prays for the issuance of process, summons and notice for the defendant for an order directing notice of suit and publication thereof to unknown persons named as defendants, and that the Court decree to plaintiff the right of judgment and condemnation, decreeing the plaintiff the full, complete and perpetual right, power and privilege to overflow, as contemplated by the project and described in House Document 90, the above mentioned land, all in connection with the maintenance and operation of the floodway. That free access is demanded to the property for the purpose set out in the petition and decree; that a perpetual easement over and across said premises is prayed for.

Said defendant William H. Danforth further states that he has duly offered plaintiff title to said easements and has requested payment in the sum of \$31,681.98 for the said flowage easement over Tract No. 243 and the sum of \$2208.94 for the said flowage easement over Tract No. 281 and herewith tenders title to said flowage easements, covering the said tracts, upon condition that the plaintiff pay in the Court the said sum of \$31,681.98 and \$2208.94, respectively, for the benefit of the defendants, as their interests may appear. That the said plaintiff has failed and refused and now fails and refuses to carry out said contract as above set forth.

102 Said defendant William H. Danforth further states that the actual damages to the two tracts, by reason of the flowage easements as set out above, are in excess of the said sums of \$31,681.98 and \$2208.94, for Tracts Nos. 243 and 281 respectively; that the offers made by the plaintiff, United States of America, and accepted by the defendant, as aforesaid, were made and accepted as compromises and settlements and as the amounts agreed upon by the parties, fixing the damages to the said two tracts of land by reason of the said flowage easements.

Wherefore, by reason of all the above, said defendant prays for judgments against the plaintiff in the sums of \$31,681.98, covering Tract No. 243 and for \$2208.94, cover-

ing Tract No. 281, together with interest at the rate of 6% per annum, to be paid in the Court for the benefit of the defendants in the case in accordance with their respective rights, and interest, and further prays that the Court decree judgment in favor of the plaintiff and against the defendants for the said perpetual flowage easements covering the said two tracts, upon payment into Court of the said sums,"

for the reason that, if the facts in said portion hereby moved to be stricken are as alleged by defendant, William H. Danforth, the same have been waived by said defendant because of his failure to plead the same prior to the entry and findings of the Court as set out in the interlocutory judgment made and entered in this cause on February 7, 1934, and for the further reason in any event, if the facts in said portion hereby moved to be stricken are as alleged by defendant, the same have been waived by defendant's failure to plead the same before the expiration of the October Term, 1933, of this court.

HARRY C. BLANTON, per L. J.
W.

L. JOHN WEBER,
Special Assistant.

JOHN C. DYOTT,
Attorneys for Plaintiff.

Dated this the 8th day of October, 1934.

Endorsed: Filed Oct. 8-1934, Jas. J. O'Connor, Clerk.

103 (Notice of Motion of William H. Danforth for Leave to Amend Exceptions to Report of Viewers.)

(Filed October 12, 1934.)

To The Above Named Plaintiff, or Harry C. Blanton and L. John Weber, Its Attorneys of Record:

Take Notice that defendant William H. Danforth will on Friday morning, October 12, 1934, at 9:00 A. M., or as soon thereafter as counsel for the said defendant William H. Danforth can be heard, present a motion to the Court to amend the exceptions heretofore filed on or about June 4, 1934, a copy of which motion is hereto attached, at which time and place you may be present if you so desire.

LEAHY, SAUNDERS & WALTHER, &
J. L. LONDON,

Attorneys for Defendant, William
H. Danforth.

104 (Motion of William H. Danforth for leave to Amend
Exceptions to Report of Viewers.)

(Filed October 12, 1934.)

Now comes the defendant, William H. Danforth, and moves the Court to permit the said defendant to amend the exceptions heretofore filed in this cause on or about June 4, 1934, in the following respects, to-wit: By adding after the word "award", at the bottom of page 2, in paragraph "1." the following:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,681.98, through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid
Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

105 "1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of

Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,

(Owner)

c/o Purina Mills

St. Louis, Mo.

(Address)

March 2, 1932.

(Date)

That the said sum of \$31,681.98 should be paid into Court by plaintiff under the law and under the said contract of settlements. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's petition, conditioned upon payment by plaintiff into Court of the said sum of \$31,681.98 for the benefit of the defendant as their interest may appear in the said cause."

Said defendant also desires to amend the exceptions by striking out Paragraph 7. reading as follows:

"7. That the award of the commissioners is based upon speculation."

106 Said defendant also desires to amend the prayer by striking the following part of the prayer:

"and that new commissioners be appointed in accordance with the law,"

and substituting therefor, after the word "aside," in the second line of the prayer the following:

"and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,681.98, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,681.98 in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor of the plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition."

LEAHY, SAUNDERS & WALTHER
& J. L. LONDON,

Attorneys for Defendant, William
H. Danforth.

Endorsed: Filed Oct. 12, 1934, Jas. J. O'Connor, Clerk.

106a

Memorandum for Clerk.

(Order of Submission of Motion of William H. Danforth for Leave to Amend Exceptions to Report of Viewers.)

United States District Court, Eastern Division of the Eastern
Judicial District of Missouri.

United States of America,
No. 716, vs.
Beatrice McDaniel, et al.

Tract No. 281

" " 243

Oct. 12, 1934.

Motion of defendant Danforth to amend exceptions filed, together with notice to take up for argument. Plaintiff appears through L. J. Weber, and defendant through J. L. Lon-

don. Motion argued and submitted, and finding as per memorandum filed.

L. JOHN WEBER,
Special Asst. to the U. S. Atty.
Atty. for Plff.

LEAHY, SAUNDERS &
WALTHER &
J. L. LONDON.

107 (Opinion and Order on Motion of William H. Danforth
for Leave to Amend Exceptions to Report of
Viewers.)

(Filed October 12, 1934.)

Motion of defendant Danforth to amend exceptions filed. Parties appear through their counsel. Motion argued and submitted. That part of motion on page one, beginning with line 6 of body of motion reading as follows:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,698.91 through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

Subject:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

"Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

"To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

"1. The Secretary of War has authorized payment for

either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

108. "2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Two thousand two hundred eight and 94/100—Dollars (\$2,208.94) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 281, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should [expedit] final settlement and reduce legal expenses.

"4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is enclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

"Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)

"That the said sum of ~~\$2,208.94~~ should be paid into the Court by plaintiff under the law and under the said contract of settlement. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's peti-

tion, conditioned upon payment by plaintiff into Court of the said sum of ~~\$2,208.94~~ for the benefit of the defendants as their interest may appear in the said cause."

That part of motion above set out is overruled on the ground that the matter pleaded in said motion has no place in the exceptions to award. Said defendant Danforth excepts to the ruling of the Court in refusing to permit the said amendment.

That part of the motion beginning on bottom of page two, beginning at line four from bottom thereof, and on page 3, reading as follows:

"Said defendant also desires to amend the exceptions by striking out paragraph 7, reading as follows:"

"7. That the award of the commissioners is based upon speculation."

Said defendant also desires to amend the prayer by striking the following part of the prayer:

109 "and that new commissioners be appointed in accordance with the law"

"and substituting therefor after the word 'aside,' in the second line of the prayer the following:

"and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,698.91, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,698.91, in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor [—] plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition,"

sustained, and said amendments may be made as requested, ~~in permitting the said amendments~~. To each of which said amendments the plaintiff separately excepts.

L. JOHN WEBER,
Special Assistant to the United
States Attorney,
Attorney for the Plaintiff.

LEAHY, SAUNDERS &
WALTHER &
J. L. LONDON.

Dated October 12, 1934.

Endorsed: Filed Oct. 12, 1934. Jas. J. O'Connor, Clerk.

110 (Order Sustaining Motion of Plaintiff to Strike Answer and Counter-claim of William H. Danforth.)

Monday, October 15, 1934.

Now on this day came the parties in the above entitled cause, by their respective attorneys; whereupon the motion of plaintiff to strike out answer and counterclaim of William H. Danforth, one of the defendants herein, as to Tracts Nos. 243 and 281, heretofore filed, is submitted to the court, and by the Court after due consideration thereof, sustained.

Ordered that exception of said defendant be, and hereby is, noted.

(Note: Hon. C. B. Faris, U. S. District Judge ruled on above motion)

(No. 14 of deft's praecipe)

111 The Court: I have not read with the very greatest care the allegations on which counsel for plaintiff were striking, but I know generally, of course, from the argument of counsel respectively and from casual examination of the matter struck out, what it is sought respectively to do. Again, it is a matter of the very greatest regret that this Court is turned loose without legal authority or compass to eke out details and procedure embraced in less than four lines of the Act of May 15, 1928. When you cite a Missouri case or when you call my attention to the settled law and policy of Missouri, I don't know whether to apply them or not. All counsel before me in this case except Mr. Weber, have assumed to either mention the Missouri Statute or a Missouri decision.

I don't know whether they apply or not. I can't tell

112 until the Court of Appeals has gone further and construed other provisions of eked out of the practice a procedure, out of circumambient atmosphere, as it were; you have got to go to the circumambient atmosphere to get it because the Statute furnishes you no consolation. Now, if it were to be decided according to what I deem to be the Missouri holdings upon the point, it is clear, I think, that in order to raise a question such as is attempted to be raised here by the defendant, it must have been timely done, because, reverting now, perhaps uselessly, to what the Supreme Court of Missouri has said upon the subject, the very right to maintain a suit on the part of the plaintiff is bottomed upon the fact that plaintiff and defendant have been wholly unable to get together. If they have gotten together, you cannot under the

Missouri practice and cases and Statutes, maintain any suit whatever. It is a matter of jurisdiction wholly, because not only must you allege, but prove, if it be contradicted, that plaintiff and defendant have been wholly unable to agree, in order that you may at all maintain the action of condemnation. I assume, perhaps, by what I am saying, that the law everywhere ought to be this way because nowhere ought a plaintiff to be required to file, and a Court to be vexed with, any vain and futile and unnecessary proceeding. So I take it if plaintiff and defendants have gotten together and have finally agreed upon this matter, then this Court has no jurisdiction to maintain this suit.

113 Now, when and where and how should that step have been reached? Clearly, it should have been reached somewhere before the filing of exceptions on the part of the defendants. It ought to have taken the form or nature of a plea; still, perhaps that would have made very little difference; but it ought to have been raised then and should have been raised then. Now, that's one reason why I think that I ought to sustain this Motion, because it was raised at the wrong time and that is to say, untimely; and that defendants may well be regarded to have waived it by filing their exceptions.

Now, as suggested by counsel for plaintiff in this case, the proceeding has no earmarks whatever of a counterclaim because, as counsel Weber says, the Government owes this man nothing. Upon its suit it will be compelled to become a debtor of the defendant, but under no circumstances does it owe him anything on which he can counterclaim anything. Perhaps, I am not sure, perhaps it is not relevant—if I were sure—nothing perhaps could prevent the defendant from going into the Court of Claims, as the Three States Lumber Company, I am advised, has done. Perhaps if he had done that, a comity might have existed between this Court and that one, which might have dominated one of the two actions. I see no earmarks at all of a counterclaim in this case.

I am not satisfied that the decision of the Supreme Court in the Thekla case in 266 U. S. covers the situation particularly. There the question was involved, not of jurisdiction bottomed upon the right to sue, but of jurisdiction
114 bottomed upon consent to be sued. You have your jurisdiction bottomed upon both. Certainly there is no provision anywhere to be found in the law permitting the Government to be sued in this case, unless it arises out of the Tucker Act. If it does not arise out of the Tucker Act, it is non-existent. So first, the defendants are asking the Gov-

ernment to permit itself to be sued in this Court without its consent; and second, they are asking the Government to permit itself to be sued for more than ten thousand dollars, which is the fixed jurisdiction of this Court. Of course the two questions are germane, I am frank to concede, but as distinguished from the Thekla Steamship case; there is one question there and two questions here, so I think for both of those reasons, and perhaps for others—if I were not too hurried—the motion to strike ought to be sustained. I am not adverting to the peculiar form of the law or the alleged accord in the case, not at all, but if I were to mention that, I would raise a serious question as to whether ever the Government of the United States, when acting through its appointed authorities, can agree to limit the jurisdiction of this Court by saying an action shall be friendly, but when it comes up to be tried it is shown not to be friendly at all; by telling this Court, in other words, that I shall be friendly when I have no authority to be friendly when the law in this case shows it is my duty to be unfriendly when I am passing on that Motion to Strike. The Motion will be sustained.

Mr. London: May I save an exception, Your Honor, please?

115 The Court: Certainly.

Mr. London: Does that include both the Answer and Counterclaim, so that the record will be clear on that?

The Court: Yes.

116 Motion to Vacate Award of Viewers, To Set Aside Findings of Fact, Interlocutory Decree and Appointment of Viewers, and for Judgments on Tracts #243 and #281.

(Filed Oct. 18, 1934)

Now comes the defendant, William H. Danforth, and moves the Court to set aside and vacate the award of the viewers heretofore filed in the above cause on May 4, 1934, in the sum of \$20,409.90 as to Tract #243, and \$967.75 as to Tract #281, and to set aside the findings of fact and the interlocutory decree entered herein on February 7, 1934, and to set aside the order appointing the viewers in the said cause as to the said tracts #243 and #281 heretofore entered by the Court on the 7th day of February, 1934, and to set aside and vacate all of the steps or actions taken by the said viewers in connection with the said two tracts, and to substitute

in lieu of the said awards judgments in the sum of \$31,681.98, together with interest at the rate of 6% from such time as the Court finds the defendant is entitled to same, as to Tract #243, and \$2,208.94, together with interest at the rate of 6% from such time as the Court finds the defendant is entitled to same, as to Tract #281, the said judgments to recite that the said sums are to be paid into the registry of the Court by the plaintiff for the benefit of the defendants, and that upon the payment into the registry of the Court of the said sums of \$31,681.98 and interest as to Tract #243 and \$2,208.94 and interest as to Tract #281, that the Court enter judgment for plaintiff for easements over the said tracts of land as prayed in plaintiff's petition, and/or the said defendant is ready and willing and herewith tenders easements over the said tracts upon payment into Court of the said sums of money, together with interest.

As grounds for said motion the said defendant states that he is the owner of the said Tracts #243 and #281 as set out in the plaintiff's petition in the above cause now pending in this Court, which tracts are correctly described in plaintiff's petition, and which descriptions are herewith adopted by reference and made a part of this motion as fully as though the same were herein fully set out; that the petition filed in this cause by the plaintiff was filed on or about the 22nd day of September, 1933, for the alleged purpose of condemning easements for flowage rights over the said two (2) tracts of land; that prior to the filing of the said suit by the said plaintiff, the plaintiff, The United States of America, and the defendant, William H. Danforth, owner of the said tracts, entered into written contracts covering the said two tracts of land, whereby the plaintiff made a written offer of settlement as to each tract of land for the damages to the said tracts, and for the purchase of easements over the said two (2) tracts of land for floodway purposes; that the said offers were duly accepted in writing by the said defendant within the time authorized by plaintiff; that plaintiff and the said defendant expressly fixed and agreed upon the damages in the sum of \$31,681.98 for a perpetual flowage easement over Tract #243 and in the sum of \$2,208.94 for a perpetual flowage easement over Tract #281; that the said written offers on the said two (2) tracts were made by the plaintiff on or about the 14th day of January, 1932, in the form of letters, dated January 14, 1932; that thereafter, at defendant's request, the plaintiff extended in writing, the time for acceptance until March 15, 1932; that on the 2nd day of March, 1932, the defendant

duly accepted, in writing, the said offers of the said plaintiff on the said two tracts of land; that the said offers
118 and acceptances were contained in the following letters, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of

offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract Map;
General map of floodway;
Addressed return envelope.

Accepted:

Wm. H. Danforth
(Owner)

c/o Purina Mills
St. Louis, Mo.
(Address)

March 2, 1932
(Date)

119

“War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Two thousand two hundred eight and 94/100—Dollars (\$2,208.94) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 281, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title can-

not be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract Map;

General map of floodway;

Addressed return envelope.

Accepted:

Wm. H. Danforth
(Owner)

c/o Purina Mills
St. Louis, Mo.
(Address)

March 2, 1932
(Date)."

120. As further grounds the said defendant states that the said contracts were entered into by the plaintiff and the said defendant pursuant to the Floodway Control Act of May 15, 1928, duly approved on the said 15th day of May, 1928, by the Congress of the United States, under which the Secretary of War was authorized to either cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights-of-way which in the opinion of the said Secretary of War and the Chief of Engineers, are needed for carrying out the project mentioned in the said Act, or which authorized the said Secretary of War to purchase such lands, easements or rights-of-way when the owner of any such land, easement, or right-of-way should fix a price for the same which in the opinion of the Secretary of War was reasonable; that the said parts of the said Act applicable are as follows:

"The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining

the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price;"

That pursuant to the said Act of Congress, and pursuant to law, the plaintiff and the defendant entered into the afore-said contracts and the method of procedure in the form of friendly condemnation proceedings was requested by said plaintiff and the proceedings were instituted by the plaintiff solely for its own benefit and its own convenience and for the purpose of clearing title to the said easements by taking judgments in condemnation proceedings, all in pursuance to the provisions as set out in the said contracts.

121 Wherefore, the said defendant, William H. Danforth, moves and prays the Court as above set out.

LEAHY, SAUNDERS &
WALTHER & J. L. LONDON

Attorneys for Defendant,
William H. Danforth.

Cape Girardeau, Mo. Dated October 18, 1934. Received
copy of within Notice. L. John Weber, Special Assistant
to the U. S. Attorney.

Endorsed: Filed Oct. 18, 1934. Jas. J. O'Connor, Clerk.

122

Term Bill of Exceptions.

(Filed Oct. 22, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,

Case No. 716. vs.

Beatrice McDaniel, et al., Defendants.

Tracts No. 243 and No. 281.

Be It Remembered that during the October Term, 1934, of the above entitled court, and on to-wit: October 8, 1934, the plaintiff filed its motion to strike from the files answer and counterclaim of defendant William H. Danforth as to Tracts 243 and 281, which said motion was in words and figures as follows, to-wit:

(Clerk here insert said Motion filed October 8, 1934).

(Heretofore already made part of record.)

And afterwards, to-wit: on October 15, 1934, and during the October Term, 1934, of said Court, the said Motion coming on to be heard by the Court, was by the Court sustained, to which action of the Court in sustaining the said motion, the said defendant, William H. Danforth, by his counsel, then and there at the time, duly excepted.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1934, the said defendant tenders this, his Term Bill of Exceptions herein, and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done October 20th, 1934, a day of the October Term, 1934, of the said Court.

C. B. FARIS,

Judge.

Endorsed: Filed Oct. 22, 1934. Jas. J. O'Connor, Clerk.

123

Term Bill of Exceptions.

(Filed Oct. 22, 1934.)

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff.

Case No. 716. vs.

Beatrice McDaniel, et al., Defendants.

Tract No. 243.

Be It Remembered that during the October Term, 1934, of the above entitled court, and on to-wit: October 12, 1934, the defendant, William H. Danforth, filed his motion to amend exceptions, which said motion was in words and figures as follows, to-wit:

(Clerk here insert said Motion filed October 12, 1934).

(Heretofore already made part of record.)

And afterwards, to-wit: on October 12, 1934, and during the October Term, 1934, of said Court, the said Motion coming on to be heard by the Court, was by the Court overruled as to amending that part of the exceptions filed June 4, 1934, by adding after the word "award", at the bottom of page 2,

in paragraph "1." the quotation set forth in the motion, to which action of the Court in overruling said portion of the said motion, the said defendant, William H. Danforth, by his counsel, then and there at the time, duly excepted.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1934, the said defendant tenders this, his Term Bill of Exceptions herein, and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done October 20th, 1934, a day of the October Term, 1934, of the said Court.

C. B. FARIS,

Judge.

Endorsed: Filed Oct. 22, 1934. Jas. J. O'Connor, Clerk.

124 (Motion of William H. Danforth for leave to amend Motion to vacate Award of Viewers.)

(Filed October 26, 1934.)

Now comes defendant, William H. Danforth, and moves the Court to permit him to amend the Motion to Vacate award of viewers, heretofore filed on October 18, 1934, as follows:

In the heading, by adding after the word "aside" in the first line, the following:

"findings of fact, interlocutory decree, and",

so that the same may read:

"Motion to vacate award of viewers, to set aside findings of fact, interlocutory decree, and appointment of viewers, and for judgments on Tracts #243 and #281."

and

By inserting after the words "set aside the" in the fourth line on page 1, the following:

"findings of fact and the interlocutory decree entered herein on February 7, 1934, and to set aside the"

LEAHY, SAUNDERS & WALTHER,
& J. L. LONDON,

Attorneys for Defendant,
William H. Danforth,

Endorsed: Filed Oct. 26, 1934. Jas. J. O'Connor, Clerk.

- 125 (Order granting Leave to William H. Danforth for leave to amend Motion to Vacate Award of Viewers.)

October 26, 1934.

Now come the parties in the above entitled cause, by their respective attorneys; thereupon, Wm. H. Danforth, one of the defendants herein, is by the court granted leave to amend his motion to vacate award of Commissioners, as to Tracts 243 and 281, heretofore filed on October 18, 1934, by interlineation, as set out in his motion to amend, this day filed.

Entered: October 26, 1934. Jas. J. O'Connor, Clerk.

- 125a (Order overruling Motion of William H. Danforth to vacate Award of Viewers, to set aside Findings of Fact, Interlocutory Decree and Appointment of Viewers, and for Judgments, etc.)

United States District Court, Eastern Division of the Eastern
Judicial District of Missouri.

U. S. A.,
No. 716 vs.
Beatrice McDaniel, et al.

....., 193

Memorandum for Clerk.

Motion of William H. Danforth to vacate award of viewers to set aside findings of fact, the interlocutory decree, the appointment of viewers, and for judgment on tracts numbered 243 and 281, overruled, for the reason that the subject matter of said motion should have been presented by answer, and the present motion has been untimely filed and presented. Exception noted by defendant.

CHAS. B. DAVIS,
Judge.

Filed Oct. 21, 1935, Jas. J. O'Connor, Clerk.

(Note: This motion was signed and submitted April 8, 1935.)

MICRO CARD

TRADE

MARK



22

39

1642



65



126 (Stipulation that Memorandum filed October 12, 1934, may be corrected.)

(Filed October 26, 1935.)

It is stipulated between the plaintiff the United States of America and the defendant Wm. H. Danforth, as to Tract No. 243, that the memorandum heretofore filed on October 12, 1934 in this cause may be corrected by the court at St. Louis, Missouri by an order nunc pro tunc directing and ordering that in lines 13 and 14 on page 1 of said memorandum, the number "281" in each line respectively be changed to read "243"; and that in the said memorandum in line 5 on page 2 thereof the number "281" may be changed to read "243", so that the designation and reference to the tract will appear throughout said memorandum correctly as to Tract No. 243.

L. JOHN WEBER,

Special Asst. to the U. S. Attorney,
Attorney for Plaintiff.

J. L. LONDON,

Attorney for defendant Wm. H. Danforth.

Dated this, the 26th day of October, 1935.

127 Order Sustaining Plaintiff's Exceptions to Awards of Viewers as to Tracts Nos. 243 and 281; and Setting Aside and Vacating the Viewers' Awards as to Said Facts.

(Filed January 28, 1936.)

And now the viewers, R. L. Shelby; E. C. Davis and E. F. Deal, heretofore appointed by this Court in this cause, on the 4th day of February, 1934, having on the 4th day of May, 1934, in furtherance of their duties, made proper and legal return and report awarding damages as to said Tract No. 243 in the sum of \$20,409.90 and as to said Tract No. 281 in the sum of \$967.75;

And the plaintiff, the United States of America, having on the 9th day of May, 1934, and within the time and in the way and manner prescribed by law, duly excepted to the report of said viewers as to said Tracts Nos. 243 and 281, by filing its written exceptions in this court in this cause; and the defendant William H. Danforth having on the 4th day of June, 1934 duly filed its exceptions to the report of said viewers as to said Tracts Nos. 243 and 281;

And the said exceptions having on the 23rd day of October, 1935 come on regularly for a hearing by this Court, upon due notice to all parties interested, the plaintiff, the United States of America appearing by its attorneys of record, and the defendants as to said Tracts Nos. 243 and 281 appearing by their attorneys of record;

And the Court having heard and duly considered the evidence offered at said hearing on the part of both the plaintiff and the defendants, as to said Tracts Nos. 243 and 281, and being fully advised in the premises, does find as follows:

That the awards of said viewers as contained in their report as to said Tracts Nos. 243 and 281 are excessive, and the exceptions thereto filed by the plaintiff should be sustained; and that the exceptions thereto filed by the defendant William H. Danforth should be overruled;

That the said awards as to said Tracts Nos. 243 and 281 should be vacated and set aside and a new appraisal of damages, if any, and benefits, if any, resulting from the appropriation described in plaintiff's petition, as to each of said tracts, should be had; and to that end, that new viewers should be appointed in the premises, or the matter of damages should be re-referred to the same board of viewers for a new appraisal;

Wherefore, it is ordered and adjudged that the exceptions of the defendant William H. Danforth herein filed as to said Tracts Nos. 243 and 281 should be and the same are overruled; that the exceptions of the plaintiff herein filed as to said Tracts Nos. 243 and 281 should be and the same are hereby sustained; that the awards of damages, contained in the said report of viewers filed on the 4th day of May, 1934 should be and the same are hereby set aside and vacated; that a new appraisal of damages, if any, and benefits, if any as to each of said Tracts Nos. 243 and 281 should be had and the same is hereby ordered and adjudged, with the provision that for the purpose of making said appraisal of said tracts, appraisers shall be appointed by this court upon application filed in this cause by the parties entitled thereto.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 28th day of January, 1936,

Endorsed: Filed Jan. 28, 1936. Jas. J. O'Connor, Clerk.

130

Term Bill of Exceptions.

(Filed March 30, 1936.)

In the District Court of the United States for the South-eastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

Tracts No. 243 and No. 281.

Be It Remembered that on the 8th day of April, 1935, the defendant, William H. Danforth, filed his motion to vacate the award of viewers, to set aside findings of fact, interlocutory decree and appointment of viewers, and for judgments on tracts No. 243 and No. 281; that the same was heard, argued and submitted; that thereafter during the October Term, 1935, and on to-wit: the 21st day of October, 1935, the said motion of the said William H. Danforth to vacate the award of viewers, to set aside findings of fact, interlocutory decree and appointment of viewers, and for judgments on tracts No. 243 and No. 281, was overruled. The said motion is in words and figures as follows, to-wit:

(Clerk here insert said motion filed * April 8th, 1935, and overruled on the 21st day of October, 1935.)

Motion filed Oct. 18, 1934, and modified Oct. 26, 1934, heretofore made part of record.

And afterwards, and on October 23, 1935, there was a final hearing before the Court on the exceptions of the plaintiff to the report of the commissioners as to tracts No. 243 and No. 281, which hearing was concluded on the 25th day of October, 1935, during the October Term, 1935, at which term the said cause was argued and submitted.

And thereafter, to-wit: on the 28th day of January, 1936, the Court sustained the exceptions of the plaintiff to
131 the award of the commissioners as to the said tracts No. 243 and No. 281, to which action of the Court in sustaining the said exceptions filed by the plaintiff to the award of the viewers as aforesaid the defendant, William H. Danforth, by his counsel, then and there duly excepted.

*Note: This motion was filed Oct. 18, 1934, modified Oct. 26, 1934 and signed and submitted April 8, 1935, and overruled Oct. 21, 1935.

And, inasmuch as the foregoing matter does not appear of record, and that the same may be preserved and presented on appeal, during the said October Term, 1935, the said defendant tenders this, his Term Bill of Exceptions herein; and prays that the same may be allowed, signed, sealed, filed and made a part of the Record herein, which is accordingly done March 28, 1936, a day of the October Term, 1935, of the said Court.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed Mar. 30, 1936, Jas. J. O'Connor, Clerk.

132 Order Appointing New Commissioners as to Tracts
Nos. 243 and 281.

(Filed April 10, 1936.)

In the United States District Court, Eastern District of
Missouri, Southeastern Division:

United States of America, Plaintiff,

No. 716. vs.

Beatrice McDaniel, et al., Defendants.

(Tracts Nos. 243 and 281.)

Now on this, the 9th day of April, 1936, comes the plaintiff, the United States of America, by its attorneys of record, and presents its oral motion showing that heretofore and on the 28th day of January, 1936, an order was entered in this cause, setting aside and vacating the viewers' awards as to Tracts Nos. 243 and 281, and which motion prays for the appointment of new commissioners to determine the damages and benefits to ensue from the condemnation herein of the said tracts.

That the said land is more particularly described as follows:

Tract No. 243, being:

(Heretofore described at marginal page 35 of this printed record.)

133 And it appearing to the Court that the said plaintiff is entitled to have viewers appointed in accordance with its motion;

It is therefore ordered that Messrs. Stephen Barton, Joseph E. Schmuke and John H. King, residents of the Southeastern Division of the Eastern Judicial District of Missouri, and being otherwise qualified by law to act, be

and the same are hereby appointed commissioners or viewers to view the said premises for the purpose of ascertaining and assessing the compensation, if any, to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay.

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, Southeastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

It is further ordered that said commissioners shall receive and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each; for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

CHARLES B. DAVIS.

Dated this, the 9th day of April, 1936.

Filed: April 10, 1936, Jas. J. O'Connor, Clerk.

135

(Recital.)

The Record does not show filing of exceptions of defendant Danforth of April 10, 1936, to order appointing viewers, as in praecipe No. 20.

136 Commissioners' Report as to Tracts Nos. 243 and 281.

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716. vs.

Beatrice McDaniel, et al., Defendants.

To the Judge and Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division:

(Filed May 29, 1936.)

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern

District of Missouri, Southeastern Division, on the 10th day of April, 1936, to view the lands hereinafter described and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commissioners being resident freeholders of S. E. Div. of E. District of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because of the aforesaid action, and that the description of the premises is as follows:

Tract No. 243, being:

137 (Heretofore described at Marginal page 35 of this printed record.)

139 That we hereby assess damages for Tract No. 243 in the sum of \$8,428.25; That we hereby assess benefits for Tract No. 243 in the sum of \$

140 That because of the conflicting interests of such parties, your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, Stephen Barton, J. H. King, and J. E. Schmuke, as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the

lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

STEPHEN BARTON,

J. H. KING,

J. E. SCHMUKE,

Commissioners.

Subscribed and sworn to before me this 29 day of May, 1936.

(Seal)

U. S. Dist. Court

East. Jud. Dist.

of Mo.

East. Div.

JAS. J. O'CONNOR,

Clerk of the U. S. District Court.

By James M. Arnold,

Deputy.

Endorsed: Filed May 29, 1936, Jas. J. O'Connor, Clerk.

141A (Renewal of Motion of William H. Danforth to vacate Award of Viewers to set aside Findings of Fact, Interlocutory decree, and Appointment of Viewers and for Judgment, etc.)

(Filed August 5, 1936.)

In the United States District Court
Eastern District of Missouri
Southeastern Division

United States of America, Plaintiff,

Case No. 716 vs.

Beatrice McDaniel, et al., Defendants.

Tract No. 243.

Now comes the defendant, William H. Danforth, and renews the motion heretofore filed on or about the 8th day of April, 1935, and overruled on or about the 21st day of October, 1935, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers, and for judgment in the sum of \$31,681.98, for the reasons set out in the said motion to vacate the said award of the viewers and to enter up judgment, and particularly on the ground that the parties reached an accord as to the extent of the damages and agreed upon the damages in the sum of \$31,681.98.

LEAHY, WALTHER,

HECKER & ELY,

J. L. LONDON,

Attorneys for Defendant,

William H. Danforth.

Note: The motion renewed was filed Oct. 18, 1934 and subsequently signed April 8, 1935 and overruled Oct. 21, 1935.

142 (Exceptions of William H. Danforth to Report
of Viewers.)

(Filed August 5, 1936.)

Comes now William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of the viewers Stephen Barton, J. H. King and J. E. Schmucke, which report was filed on the 29th day of May, 1936, and as grounds of his exceptions states:

1. That the said viewers and each of them were without jurisdiction or power to render an award.

2. That the Court was without jurisdiction or power to appoint the viewers.

3. That the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewer in this cause, and more particularly prior to the appointment of the viewers Stephen Barton, J. H. King and J. E. Schmucke, in which contract the said plaintiff and the said defendant William H. Danforth had agreed upon a settlement for damages as to Tract #243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that the said offer was

143 duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid
Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98), for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

144

"Accepted:

Wm. H. Danforth,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

4. Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

5. Because the said viewers were biased in favor of the Government.

6. Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the government.

7. Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the properties taken and property affected and damaged by the flowage rights demanded and required by the Government over this defendant's land.

8. Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow compensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

9. Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

10. Because the award of the said viewers is improper in form as well as in substance.

11. Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

12. Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the
145 defendant William H. Danforth as to Tract #243, to which action of the Court in sustaining the said motion to strike the said defendant, William H. Danforth, duly excepted.

13. Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

14. Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant duly excepted.

15. Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

16. Because the Court erred in sustaining the exceptions of the plaintiff as to the award of the viewers as to Tract #243, and erred in entering an order sustaining plaintiff's exceptions, to which action of the Court said defendant, William H. Danforth, duly excepted.

17. Because the Court erred in appointing, on or about the 10th day of April, 1936, viewers as to Tract #243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke.

18. Because the Court erred in receiving the report of the viewers Stephen Barton, J. H. King and J. E. Schmucke as to Tract #243 on or about the 29th day of May, 1936.

19. Because the Court should have sustained the motion of defendant William H. Danforth for judgment and should have awarded flowage rights to plaintiff and entered up an award in the sum of \$31,681.98 as to Tract #243.

Wherefore, defendant William H. Danforth prays the Court to sustain his exceptions and vacate and set aside the award of the said viewers, and that the Court either appoint new viewers with instructions from the Court to enter up an award in the sum of \$31,681.98, the amount agreed to be paid by plaintiff as set forth in Paragraph 3 of these exceptions, or that the Court enter up a judgment

in the said sum of \$31,681.98 in favor of the defendant William H. Danforth and against the plaintiff.

LEAHY, WALTHER, HECKER & ELY & J. L. LONDON,
Attorneys for Defendant,
William H. Danforth.

Received copy this August 5, 1936. L. John Weber, Special Attorney, Dept. of Justice, 935 New Federal Bldg., St. Louis, Mo.

Endorsed: Filed Aug. 5, 1936. Jas. J. O'Connor, Clerk.

147

(Recital.)

The Record does not show filing of Term Bill of Exceptions following motion filed August 5, 1936, to vacate award of Viewers, etc., as requested in praecipe No. 30.

148

(Recital of Resubmission to Court of Motion of William H. Danforth for Judgment and overruling thereof.)

Entered October 23, 1936.

Come now the parties herein by their respective attorneys; whereupon, the motion of defendant for judgment in this cause is now taken up and resubmitted to the Court, and by the Court after due consideration thereof, overruled. Thereupon, the final hearing of this cause before the Court on the separate exceptions of the defendant, Wm. H. Danforth, to the award of commissioners as to Tracts No. 243 and No. 281, is begun and concluded, and said cause is now submitted to the Court.

Note: Hon. Chas. B. Davis sat as United States Judge.

149

(Order Sustaining Exceptions of William H. Danforth for the Reason that the Award is Inadequate.)

(Filed October 24, 1936.)

Tract 243.—1033.56 Acres. Award.—\$8428.25

Defendant's exceptions sustained for the reason that the award is inadequate.

CHARLES B. DAVIS,
U. S. District Judge.

Entered Oct. 24, 1936.

Attest:

A true copy,
(Seal)

JAS. J. O'CONNOR, Clerk.

150 Order Appointing New Commissioners as to Tract
No. 243.

(Filed November 28, 1936.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
No. 716. vs.

Beatrice McDaniel, et al., Defendants.

(Tract No. 243)

Now on this, the 28th day of Nov. 1936, comes the plaintiff, the United States of America, by its attorneys of record, and presents its oral motion showing that heretofore and on the 24th day of October, 1936, an order was entered in this cause setting aside and vacating the viewers' award as to Tract No. 243, and which motion prays for the appointment of new commissioners to determine the damages and benefits to ensue from the condemnation herein of the said tract.

That the said land is more particularly described as follows:

(Heretofore described at Marginal Page 35 of this printed record.)

151 And it appearing to the Court that the said plaintiff is entitled to have viewers appointed in accordance with its motion:

It is therefore ordered that Messrs. Stephen Barton, Joseph E. Schmuke and John H. King, residents of the Southeastern Division of the Eastern Judicial District of Missouri, and being otherwise qualified by law to act, be and the same are hereby appointed commissioners or viewers to view the said premises for the purpose of ascertaining and assessing the compensation, if any, to which the said defendants shall be entitled for the easement herein condemned, and the resulting damages to the said property, if any, which may be sustained by the respective owners or persons claiming an interest therein; also to ascertain any special benefits to said property on account of the establishment of said floodway, in the amount that such property shall be benefited by its establishment, if any, and to assess the balance of said value and damages over and above the amount of such special benefits assessed against the plaintiff, and make their report under oath to the undersigned without unnecessary delay.

It is further ordered that the Clerk of the United States District Court for the Eastern District of Missouri, Southeastern Division, shall prepare copies of this order and cause the same to be served upon the commissioners; and

152 It is further ordered that said commissioners shall receive and be paid for the services herein designated for them to perform at the rate of \$20.00 per day, per each, for such time as they shall be actively employed in the performance of the said services together with compiling and making of their report.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 28th day of Nov. 1938.

Filed Nov. 28, 1936. Jas. J. O'Connor, Clerk.

153

(Recital.)

The Record does not show filing of "Term Bill of Exceptions" filed Nov. 30, '36, as called for in praecipe No. 35.

154 (Report of Commissioners as to Tract No. 243.)

(Filed March 11, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division

United States of America, Plaintiff,

No. 716. vs.

Beatrice² McDaniel, et al., Defendants.

(Tract No. 243)

To the Judge and Clerk of the United States District Court, Eastern District of Missouri, Southeastern Division:

The undersigned Commissioners duly appointed by the Judge of the United States District Court for the Eastern District of Missouri, Southeastern Division, on the 28th day of November, 1936, to view the lands hereinafter described as Tract No. 243, and appraise the damages sustained to said premises on account of the acquirement by condemnation of a perpetual easement and privilege to overflow by diversion of excessive flood waters from the Mississippi River, certain lands known as the floodway area, as provided for by the Act of Congress of May 15, 1928, and known as House Document No. 90, also to appraise the benefits accruing to said premises because of the aforesaid action; and the said commis-

sioners being resident freeholders of Southeastern Division of the Eastern Judicial District of Missouri, and disinterested in the matters and things above stated, and having first subscribed to the usual and required oath, and being qualified by law to serve as such Commissioners, do respectfully report:

That in obedience to the order of the said Court we did proceed to view the lands hereinafter described and appraise the damages and benefits sustained to said premises because of the aforesaid action, and that the description of the premises is as follows:

155 (Heretofore described at marginal page 35 of this printed record.)

That we hereby assess damages for Tract No. 243 in the sum of \$20409.90; That we hereby assess benefits for Tract No. 243 in the sum of \$.....

156 That we hereby assess damages for Tract No. 243 in the sum of \$17,921.70; that we hereby assess benefits for Tract No. 243 in the sum of \$.....

That because of the conflicting interests of such parties your Commissioners do not make any report as to the ownership respectively of defendants, in said premises or the proportionate rights or claims therein of any of said defendants.

The undersigned Commissioners, Stephen Barton, J. E. Schmuke and J. H. King, as aforesaid, being duly sworn, upon their oath, state that the matters and things hereinbefore stated are true to the best of their knowledge and belief and that they have to the best of their abilities viewed the lands and assessed the damages and benefits to said premises, as hereinbefore set forth.

STEPHEN BARTON,
J. E. SCHMUKE,
J. H. KING.

Subscribed and sworn to before me this 11th day of March, 1937.

JAS. J. O'CONNOR,
Clerk of the U. S. District Court.
By: James M. Arnold,
Deputy Clerk.

(Seal)

Endorsed: Filed Mar. 11, 1937. Jas. J. O'Connor, Clerk.

157 Plaintiff's Exceptions to Viewers' Report Filed
March 11, 1937, as to Tract No. 243.

(Filed March 30, 1937.)

Comes now the plaintiff and excepts to the findings of the viewers heretofore appointed by the Court to view the property described in the petition filed in this cause, designated as Tract No. 243, as contained in their report filed in this cause on March 11, 1937, and files its said exceptions with the Clerk of this Court. The plaintiff excepts to the findings of the said viewers for the following reasons among others, to-wit:

That the amount found as assessed damages alleged to have been suffered by the defendants because of the condemnation of an easement for-flowage rights over said property described in this cause as Tract No. 243 is excessive, exorbitant, and inconsistent with the facts;

That the said findings are inconsistent with the findings in other cases under the same state of facts and conditions in proceedings of like nature concerned in the levee and flood-way project described in the petition;

That the findings are against the weight of evidence;

That the said viewers placed an excessive and exorbitant value upon the real estate condemned;

That the said viewers failed to be governed by the law in such cases made and provided in that they failed to value said premises according to the market value thereof at the time of filing the said petition, or at the time of making said report;

That the value of the improvements placed upon said premises is in excess of their actual value and that the damages allowed therefor are in excess of what will be sustained to said improvements;

158. That the findings are indefinite and uncertain and that the plaintiff is not definitely and adequately informed as to the nature of the damages to said premises and improvements thereon, and the manner in which such damages apply and how applied;

That the said viewers have considered elements of damage such as speculative or resale values, contrary to law;

That the said viewers have proceeded upon the theory that the condemnor is liable for damages resulting from overflow of the lands under condemnation, from crevasses in said riverside levee at points other than at the point designated as the fuse plug section, which is contrary to the letter and spirit of the Floodway Act, and for damages resulting from the overflow from said Mississippi River upon the said lands occasioned by other than the acts of this condemnor in diverting excessive flood waters from said river, to all of which the condemnor excepts;

That in arriving at the designated amount fixed by the report as damages, the said viewers have wholly failed to consider the periods or frequency of such overflow that would be due directly to the operation of the project as defined in the petition;

That the said viewers were and are actuated and governed in their findings by bias and prejudice against this sovereign plaintiff and the said project, and are partial to and in behalf of the person or persons owning the premises described in their said report;

That the award by the viewers as to said Tract No. 243 is excessive and exorbitant in that the said viewers awarded to the defendant owners of said Tract No. 243 a sum more than \$1000.00 in excess of the amount of damages which the said owners will suffer by virtue of the operation of the project described in the petition;

That the said viewers awarded damages due to wash and erosion on the tract, and which fact is contrary to conditions which would prevail when the said project is in operation;

That the value of a perpetual flowage easement fixed by said commissioners was improperly and erroneously arrived at by them and in a way and manner other than provided for or contemplated by the Flood Control Act of 1928, and the practice and procedure under the condemnation proceedings now pending and in response to which the appointment of these commissioners was authorized. That said commissioners viewed said premises and arrived at their conclusions when the said premises were subjected to the servitude of flood water that had been diverted from the main channel of the Mississippi River, through crevasses and breaches in the river front levee, at places other than the so-called fuse plug area at the northern extremity of the floodway area; that said commissioners improperly considered the servitude imposed upon said premises by flood waters entering said

floodway from sources other than the place contemplated by the said adopted project, as provided for in House Document No. 90, as adopted by the Flood Control Act of 1928, and at a crest in said river and on the Cairo gauge in excess of the present protection afforded by the said river front levees, to-wit:—58½ feet on the Cairo gauge; that the damages considered by them as affecting the value of the flowage easement were arrived at by the improper consideration of flood waters which had been diverted by nature and the force of the river itself, rather than of the reduced levee at the fuse plug section in the northern extremity of the floodway area and over a river side levee in excess of 58½ feet on the Cairo gauge;

That the said commissioners were unduly influenced by the opinion which the Court had heretofore filed in this case, in which the Court indicated its own opinion as to the value of said flowage easement and were thus improperly influenced in arriving at their opinion; that the incorporation into the record of the Court's opinion as to the value of said flowage easement invaded the province and functions of the said commissioners; that the Flood Control Act of 1928 provides that the amount of award, if any, shall be fixed by a Commission of three, subject to the approval of the Court; that the province of the Court is to approve or disapprove the amount of the award, but that the Court is without authority to indicate to said commissioners or in any wise dictate to said commissioners its opinion as to the value of said easement; and that the incorporation in the record of this case of such an opinion by the Court was an invasion of the duties and prerogatives of the said commissioners.

That because of the foregoing assignments together with others not herein stated, the plaintiff asks the Court to vacate, set aside and for naught hold the said findings, as unwarranted in law and not authorized by the facts existing in the premises; and plaintiff asks that it [—] heard in support of these objections, and upon the hearing of same, that this Court will make such order herein as right and justice require.

HARRY C. BLANTON,
U. S. Attorney.

L. JOHN WEBER,
Special Attorney,
Attorneys for Plaintiff.

* Dated this, the 29th day of March, 1937.

Endorsed: Filed March 30, 1937. Jas. J. O'Connor,
Clerk.

160 (Exceptions of William H. Danforth to Report of Viewers as to Tract No. 243.)

(Filed March 20, 1937.)

Comes now William H. Danforth, a resident of St. Louis, Missouri, and objects and excepts to the report of the viewers, Stephen Barton, J. H. King and J. E. Schmucke, which viewers were appointed by the Court under date of November 28, 1936, which report was filed on the 11th day of March, 1937, in the above entitled cause, and in the amount of Seventeen Thousand Nine Hundred Twenty-one Dollars and Seventy Cents (\$17,921.70), and as grounds for his exceptions, states:

1. That the said viewers, and each of them, were without jurisdiction or power to make, render or file an award.

2. That the Court was without jurisdiction or power to appoint the viewers.

3. That the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewers in this cause; and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke; that in the said contract the said plaintiff and the said defendant, William H. Danforth, had agreed upon a settlement for the damages to the said Tract No. 243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-Eight Cents (\$31,-

161 681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that the said offer was duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by the plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and written acceptance were in the following words and figures, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building,
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100... Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;

General map of floodway;

Addressed return envelope.

Accepted:

WM. H. DANFORTH,

(Owner)

c/o Purina Mills,

St. Louis, Mo.

(Address)

March 2, 1932

(Date)."

That the following letter was written by the Government extending the time limit for acceptance to March 15, 1932:

Address Reply to

District Engineer

U. S. Engineer Office

1006 McCall Building

Memphis, Tenn.

War Department

U. S. Engineer Office

1006 McCall Building

Memphis, Tenn.

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—Flowage—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

c.c. to 1st Area."

163 4. Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

5. Because the said viewers were biased in favor of the Government.

6. Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the Government.

7. Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the easement taken and for the property affected and for the damages caused and to be caused by the flowage rights demanded to be required by the Government over this defendant's said land.

8. Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow com-

compensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

9. Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

10. Because the award of the said viewers is improper in form as well as in substance.

11. Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

12. Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the defendant William H. Danforth as to Tract #243, to which action of the Court in sustaining the said motion to strike the said defendant, William H. Danforth, duly excepted.

13. Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

14. Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

15. Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

16. Because the Court erred in recognizing the right of the viewers to act in either making or filing a report or an award and erred in appointing viewers or in taking any steps other than entering up a judgment in the said sum of
165 Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents. (\$31,681.98), together with interest.

17. Because the Court erred in appointing on or about the 10th day of April, 1936, viewers as to Tract No. 243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke, and erred in subsequently re-appointing the said viewers as above set out under date of November 28, 1936.

18. Because the Court erred in receiving the report of the said viewers, Stephen Barton, J. H. King and J. E. Schmueke as to Tract No. 243 on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

19. Because the Court erred in failing and refusing to sustain the motion of defendant, William H. Danforth, for judgment, and should have awarded flowage rights to plaintiff, and entered up an award and judgment in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98) as to Tract No. 243.

Wherefore, defendant William H. Danforth prays the Court to sustain his exceptions; to vacate and set aside the award of the said viewers; that the Court either appoint new viewers with instructions from the Court to enter up an award in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98), together with interest from such time as the Court may find that plaintiff appropriated the flowage easement in question, or the right to flood the land in question, which the said defendant contends dates from the passage of the law authorizing the same, or that the Court enter up a judgment in the said sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98), together with interest

166 as aforesaid, in favor of the defendant, William H. Danforth, and against the plaintiff, and upon payment of the same that the Court decree an appropriate judgment in favor of plaintiff for the said easement.

LEAHY, WALTHER, HECKER
& ELY,
and J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Copy of the within served on me this the 20th day of Mch.,
1937.

JNO. WEBER,
Atty. for U. S.

J. C. DYOTT,
Counsel

Endorsed: Filed March 20, 1937. Jas. J. O'Connor, Clerk.

167 (Findings and Judgment of District Court Relating to Tract No. 243.)

(Filed April 23, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716. vs.
Beatrice McDaniel, et al., Defendants.

(Tract No. 243.)

Now on this, the 23rd day of April, 1937, having considered the evidence submitted by both plaintiff and defendants in the above numbered cause as to Tract No. 243, being a portion of the real estate described in said petition, and being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, the Court doth find and adjudge and decree in the manner following, to-wit:

The Court finds that the United States of America is plaintiff and that the following are defendants:

(see succeeding pages for lists.)

168 Beatrice McDaniel, Poplar Bluff, Missouri;

• • • • •

171 William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

175 The Court doth further find that this proceeding was instituted by the plaintiff in the way and manner as is by statute, in such cases, made and provided; that said petition sets forth a complete cause of action which has for its purpose, the acquirement by proceedings in condemnation of a perpetual easement over, upon and across the lands described in said petition, and which said easement is acquired for the use and benefit of said plaintiff in the establishment of a floodway, as defined and described in said petition, and in furtherance of, and in compliance with, and in conformity to the act of Congress of May 15, 1928, Chapter 569, entitled "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", and which is designated and known as the "Flood Control Act".

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided;

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with

all necessary writs and notices required by law, and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

176. The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the use and purpose set forth in said petition; and that the said Court did in accordance with said notice, upon the 7th day of February, 1934, appoint three viewers, to-wit: E. P. Deal, R. L. Shelby and E. C. Davis to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned to them by the Court, and the law in such case made and provided, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them, that on the 4th day of May, 1934, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

177. that the amount awarded by said viewers in their report filed on May 4, 1934, as to said Tract No. 243 was \$20,409.90; that exceptions to said viewers' award as to said Tract No. 243 were duly filed both by the plaintiff herein and by the defendant William H. Danforth; that on October 23, 1935, upon due notice to all parties, said cause came on to be heard upon the said exceptions, and that upon the evidence presented by both plaintiff and defendants, the Court did sustain the exceptions of the plaintiff and did overrule the exceptions of the defendant William H. Danforth, and vacate and set aside the said award of viewers as contained in their report filed on May 4, 1934, all as set out in the order of the Court filed and entered on January 28, 1936; that on April 10, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to a new board of viewers,

to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 29th day of May, 1936, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on May 29, 1936, was \$8428.25;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

178. That the defendant William H. Danforth did on the 5th day of August, 1936, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on May 29, 1936, as to the amount assessed therein for damages to said Tract No. 243; that no exceptions to said viewers' report were filed by the plaintiff herein, nor by any other of the defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 23rd day of October, 1936, upon due notice to all parties, said cause came on to be heard upon the said exceptions of the defendant William H. Danforth, and that upon the evidence presented by both plaintiff and defendant, the Court did sustain the exceptions of the defendant, and did vacate and set aside the said award of viewers as contained in their report filed on May 29, 1936, all as set out in the order of the Court filed and entered on October 24, 1936; that on November 28, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to the same board of viewers, to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 11th day of March, 1937, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due

form; that the amount awarded by said viewers in their report filed on March 11, 1937, was \$17,921.70;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

179 That the plaintiff did on the 30th day of March, 1937, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on March 11, 1937, as to the amount assessed therein for damages to said Tract No. 243, and that the said William H. Danforth filed his exceptions to said viewers' report on March 20, 1937; that no exceptions to said viewers' report were filed by any of the other defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 21st day of April, 1937, upon due notice to all parties, said cause came on to be heard upon the exceptions of plaintiff and defendant William H. Danforth; that all the issues and matters in connection with said Tract No. 243 were submitted to the Court, and that upon evidence submitted by both plaintiff and defendants, the Court did overrule the said exceptions of the plaintiff, and of the defendant William H. Danforth, and did confirm the said viewers' report as to said Tract No. 243; that the plaintiff is entitled to a judgment in condemnation of said land and the defendants herein having any right, title or interest in and to said Tract No. 243 are entitled, in solido, to damages in the sum of \$17,921.70, the said sum being the full amount to which said defendants named in said petition as claiming an interest in and to said tract, and any and all other persons who may be found entitled thereto, are entitled for the purposes for which said action in condemnation was brought, and being the same amount of damages as found by said viewers in their report filed as aforesaid, on March 11, 1937;

The Court finds that the premises described in this petition as Tract No. 243; over which the plaintiff seeks to condemn the said easement and which said premises were viewed by said commissioners or viewers, and which are included in the report thereof, are bounded, defined and described as follows:

180 Tract No. 243, being:

243 Floodway.

Description.

(Heretofore described at marginal page 35 of this printed Record.)

181 The Court doth further find that the easement which plaintiff seeks over and across the above described premises is in completion of the project provided for, and in compliance with, the Act of Congress of May 15, 1928, Chapter 569.

Now Therefore, it is ordered, adjudged and decreed that the said exceptions to the report of the viewers as to said Tract No. 243 should be, and the same are hereby overruled; that the said award of commissioners as to said Tract No. 243 should be, and the same is hereby confirmed and the sum of \$17,921.70 is awarded, in solido, to the defendants named in said petition as claiming an interest in and to said land and to any and all other persons who may be found entitled thereto; that the plaintiff-condemnor, to-wit, the United States of America, by virtue of this proceeding shall have judgment in condemnation against the premises described in said petition, and for the purposes therein defined, and against the defendants therein and each and all of them, jointly and severally as their rights may appear; and that the said plaintiff shall acquire the full, complete and perpetual easement over and across said lands, and the power, right and privilege to cause said lands hereinbefore described to be used for the purpose of a floodway as contemplated by the Act of Congress of May 15, 1928, Chapter 569, and as more fully described in House Document 90 which is made a part of said Act, and that such right shall forever vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, claim, title or interest, of any name, nature or description; that shall in any wise conflict with or interfere with the right of said plaintiff to establish and maintain the aforesaid floodway, and such right shall be vested in the United States of America forever; and

182 It Is Further Ordered that the plaintiff herein shall pay into the registry of this court the sum of \$17,921.70, in solido, which shall be held for the use and benefit of the defendants named in said petition as claiming an interest in and to said Tract No. 243, and any and all other

persons who may be found entitled thereto, in the way and manner and in proportion as this Court shall hereafter order, adjudge and decree; and that upon the payment of the said sum, the plaintiff shall be entitled to the relief prayed for in said petition, and as prayed.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 23rd day of April, 1937.

Endorsed: Filed Apr. 23, 1937. Jas. J. O'Connor, Clerk.

183 (Record entry of setting aside Award of First and Second Commissions; Exceptions to award of Third Commission overruled.)

(Filed April 23, 1937.)

In the United States District Court for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,
Suit 716 vs. Tract 243.
Beatrice McDaniel, et. al., Defendants.

Tract 243—1033.56 acres.

Award of First Commission, \$20,409.90, heretofore set aside on exceptions of plaintiff as excessive.

Award of Second Commission, \$8,428.25, heretofore set aside on exceptions of defendant, William H. Danforth, as inadequate.

Award of Third Commission, \$17,921.70, to which both plaintiff and defendant, William H. Danforth, have filed and submitted exceptions.

Exceptions of both plaintiff and defendant, William H. Danforth, to the report and award of the Third Commission are overruled.

United States District Judge.

Report of Commissioners approved and confirmed; judgment of condemnation awarded plaintiff as prayed; damages of defendant fixed at the amount set out in Report of Commissioners and judgment entered accordingly in the above case this day.

J.J.O'C.

April 23, 1937

183a (Record entry of filing of Motion of Plaintiff
for New Trial as to Tract No. 243.)

April 27, 1937.

Now on this day comes the United States by the United States Attorney and files motion for a new trial as to tract No. 243 in this cause.

184 Plaintiff's Motion for New Trial as to Tract No. 243.
(Filed April 27, 1937)

Now comes the plaintiff, the United States of America, by its attorneys, in the above entitled cause, as to Tract No. 243, and moves the Court to set aside the order and judgment of the court in the within cause as to said Tract No. 243, rendered, made and entered on April 23, 1937, overruling the exceptions of plaintiff in said cause as to said Tract No. 243, adjudging condemnation for plaintiff and adjudging damages as to said Tract No. 243 in the sum of \$17,921.70, and to grant plaintiff a new trial therein for the following reasons:

(1) That the said order of the court overruling plaintiff's exceptions in the within cause as to said Tract No. 243 is against the evidence and against the weight of the evidence;

(2) The finding and verdict of the court overruling plaintiff's exceptions as to said Tract No. 243 is contrary to law;

(3) The finding and verdict of the court as to said Tract No. 243 was for the wrong party;

(4) The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the defendant as to said Tract No. 243 in the within cause;

(5) The Court erred in rejecting competent, relevant and material evidence offered by the plaintiff as to said Tract No. 243 in the within cause;

185 (6) That the instructions of the court to the commissioners given prior to the return of the instant award filed March 11, 1937, contained the following directions:

You have been appointed commissioners to assess against plaintiff and in favor of defendants, the sum of money which should be awarded to compensate defendants for damages, if any, which will accrue to defendants by reason of the con-

version of the lands of defendants into a potential floodway, and into a temporary floodway, upon the happening of a contingency below mentioned.

"The authority for these proceedings is found in the so-called Flood Control Act of the U. S. Congress, approved May 15, 1928, and more particularly under Section 4 thereof, which provides that the Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way, which, in the opinion of the Secretary of War and Chief of Engineers, are needed to carry out this project. The said proceedings are to be instituted in the U. S. District Court for the district in which the lands, easements or rights of way are located. This same section requires that the United States shall 'provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River,' which section is construed as meaning, those additional waters created by floods, which, when the project is completed, would be diverted from the main channel of the Mississippi River, but which would not now, under the present levee structure, pass into the floodway territory.

"This is to say—those floods which would pass over the fuse plug section of the riverside levee at 55 feet on the Cairo gauge, but which would not pass over the present riverside levee as now constructed. The 'Additional destructive flood waters' that will pass by reason of diversion from the main channel of the Mississippi River, is the difference between 55 feet on the Cairo gauge and the protection afforded by the riverside levee as now existing within the so-called fuse plug area. The Government cannot be charged with the responsibility of any damages created by those floods which would pass over the riverside levee as now constructed.

"No land or property of defendants is to be presently taken, touched or damaged by plaintiff, and none will ever be physically taken. Plaintiff is here seeking to subject the lands of defendants to such damage or injury as will accrue to them, when and if, such lands shall be flooded and by reason of flooding them, whenever the height of the flood water in the Mississippi River shall exceed 55 feet on the Cairo, Illinois gauge, subject to consideration of the protection afforded by the old or original levee against flood waters, as herein set forth.

"Whenever the height of the flood water in the Mississippi River shall exceed 55 feet on the said gauge, subject to consideration of the protection afforded by the old 186 or original levee against flood waters, as herein set forth, it is contemplated that a crevasse will occur at some point in the north eleven mile fuse plug section, which begins at the north end of the set back levee and runs south along and with the old or original levee, a distance of eleven miles, and that thereupon land in the floodway will be overflowed by water from the Mississippi River, and consequently damage may occur to all lands within the floodway area."

That the evidence at the instant hearing showed that the commissioners disregarded the Court's instructions by viewing the aforesaid tract of land while covered by flood waters of the character and type defined and described by the Court in said instructions as an inhibited floodwater, and the evidence showed that the said commissioners were influenced thereby and took the January flood of 1937, an inhibited flood, into consideration in arriving at their award, to which plaintiff duly excepted; and that the Court at the hearing of plaintiff's exceptions to the commissioners' award, and over plaintiff's objection and exception duly saved, permitted the introduction of testimony as to the effect on the aforesaid lands of such inhibited flood, and that the Court was influenced thereby in its unfavorable action relative to plaintiff's exceptions herein; that the commissioners erred by going in derogation of the Court's instructions by bringing in an excessive award as alleged in plaintiff's exceptions, and that the Court erred in failing to sustain plaintiff's exceptions when it became apparent to the Court that said commissioners had violated the Court's instructions in bringing in an award based on the effect of a floodwater inhibited under the Court's said instructions to commissioners.

187 (7) The Court erred in admitting testimony tending to prove or establish any action by officers and agents of the United States in artificially crevassing, by dynamite or otherwise, any part of the riverside levee between Bird's Point and New Madrid, Missouri, for the reason that it had been established that the Bird's Point-New Madrid floodway has not yet been completed and that any such action by any Government official, agent or representative, was in violation of Section One of the Flood Control Act of May 15, 1928, was tortious in its effect, and for which the United States

should not and could not be made liable in damages under the aforesaid Flood Control Act;

(8) That the Court erred in failing to hold that the January, 1937 flood was of such type, character and proportion as to be a non-project flood—that is to say, the type, character, time and effects of which were not contemplated by the Flood Control Act of May 15, 1928 as a flood covering which the United States was required under said act to provide flowage easements therefor; that the flood of January, 1937 inundated the territory within the Bird's Point-New Madrid floodway by flood waters thrown in by forces of nature at a crest or elevation in excess of the protection afforded by the riverside levee, and that they were not waters artificially diverted pursuant to the plan under the provisions of the Flood Control Act of May 15, 1928 as excess flood waters from the main channel of the Mississippi River between 55 feet on the Cairo gauge and 57½ feet, the elevation at which the present riverside levee affords protection;

188 The Court erred in filing a memorandum of its findings in the trial on exceptions prior to the instant trial, in which memorandum figures containing the Court's ideas as to values were indicated; and the said memorandum being a court record, became available for inspection by the commissioners in the instant proceeding, they having been furnished a copy of the same from the office of the Clerk of the United States Court, whereas under the law the Court was restricted in said prior proceeding to passing upon the adequacy or inadequacy of the award of the commissioners without making any findings of fact, the same being the sole function of the Court upon a hearing on exceptions; that plaintiff's exceptions in the instant proceeding contained a count setting forth said objection, alleging that the commissioners were unduly influenced by the said expressed opinion of the Court as to values, and the exceptions of plaintiff in the instant proceeding should have been sustained as a matter of law because of the said objection of plaintiff incorporated in its said exceptions to the award filed March 11, 1937, and upon the further showing by the plaintiff at the hearing on the instant exceptions that the commissioners were influenced thereby.

HARRY C. BLANTON,

United States Attorney.

L. JOHN WEBER,
Special Attorney, Department of
Justice.

JOHN C. DYOTT,
Special Attorney, War Dept.
(Attorneys for Plaintiff.)

Dated this, the 27th day of April, 1937.

Endorsed: Filed Apr. 27, 1937, Jas. J. O'Connor, Clerk.

188a (Record Entry of Filing of Motion of William H. Danforth for New Trial as to Tract No. 243.)

July 14, 1937.

Now comes defendant, William H. Danforth, and files motion for new trial as to tract No. 243 in this cause.

189 (Motion of William H. Danforth for New Trial as to Tract No. 243.)

(Filed July 14, 1937.)

Comes now the defendant, William H. Danforth, and moves the Court to set aside the judgment of condemnation awarded plaintiff as prayed, and the judgment entered in favor of defendant and against the plaintiff in the sum of Seventeen Thousand Nine Hundred Twenty-one and 70/100 (\$17,921.70) dollars, and as grounds for said motion states:

(1) That the viewers, and each of them, were without jurisdiction or power to make, render or file an award.

(2) That the Court was without jurisdiction or power to appoint the viewers.

(3) That plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into a written contract prior to the appointment of any viewers in this cause, and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke; that in the said contract the said plaintiff and said defendant, William H. Danforth, had agreed upon a settlement for the damages to the said Tract No. 243 in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,190.681.98); that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which said offer was dated January 14, 1932; that

It said offer was duly extended by plaintiff and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by the plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and written acceptance were in the following words and figures, to-wit:

“War Department
U. S. Engineer Office
1006 McCall Building,
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

191 4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and

return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incs.

Tract map;
General Map of floodway;
Addressed return envelope.

Accepted:

WM. H. DANFORTH,
(Owner)
c/o Purina Mills
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

1. That the following letter was written by the Government extending the time limit for acceptance to March 15, 1932:

Address Reply to "War Department
District Engineer U. S. Engineer Office
U. S. Engineer Office 1006 McCall Building
1006 McCall Building, Memphis, Tenn.
Memphis, Tenn.

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—
[Plowage]—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers, Dis-
trict Engineer.

cc. to 1st Area."

192 (4) Because the award of the said viewers is based upon erroneous principles of law and of valuation of the land in question.

(5) Because the said viewers were biased in favor of the Government.

(6) Because the report of the viewers shows on its face that the said viewers, and each of them, were prejudiced against the defendant, William H. Danforth, and biased in favor of the Government.

(7) Because the award of the viewers is grossly inadequate and is not a fair and just compensation for the easement taken and for the property affected and for the damages caused and to be caused by the flowage rights demanded to be required by the Government over this defendant's said land.

(8) Because the said viewers did not, in arriving at the amount of their award, take into consideration and allow compensation for the fact that the flowage would cause damage to the whole tract and would destroy a large part of the same.

(9) Because the said viewers gave no opportunity to this defendant to be heard and failed to notify this defendant of any hearing before the said viewers.

(10) Because the award of the said viewers is improper in form as well as in substance.

(11) Because the said viewers failed to take into consideration, in arriving at their award, proper, legal and just elements of compensation and damage.

(12) Because the Court erred in striking from the files on October 15, 1934, the answer and counterclaim of the defendant William H. Danforth as to Tract No. 243, to which action of the Court in sustaining the said motion to
193 strike the said defendant, William H. Danforth, duly excepted.

(13) Because the Court erred in overruling, in part, the motion of the defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934.

(14) Because the Court erred in overruling on October 18, 1934, the motion of the defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,-

681.98, which had been duly agreed upon between plaintiff and the said defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

(15) Because the Court erred in overruling on October 21, 1935, the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers, to set aside the finding of facts, the interlocutory decree, the appointment of viewers and for judgment, to which action of the Court said defendant, William H. Danforth, duly excepted.

(16) Because the Court erred in recognizing the right of the viewers to act in either making or filing a report or an award and erred in appointing viewers or in taking any steps other than entering up a judgment in the said sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98), together with interest.

(17) Because the Court erred in appointing on or about the 10th day of April, 1936, viewers as to Tract No. 243, the said viewers being Stephen Barton, J. H. King and J. E. Schmucke, and erred in subsequently re-appointing the said viewers as above set out under date of November 28, 1936.

(18) Because the Court erred in receiving the report of the said viewers, Stephen Barton, J. H. King and J. E. Schmucke as to Tract No. 243 on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

(19) Because the Court erred in failing and refusing to sustain the motion of defendant, William H. Danforth, for judgment, and should have awarded flowage rights to plaintiff, and entered up an award and judgment in the sum of Thirty-one Thousand Six Hundred Eighty-one Dollars and Ninety-eight Cents (\$31,681.98) and interest as to Tract No. 243.

(20) That the said award and judgment are contrary to the law, the evidence, and the evidence under the law.

(21) That the said award is against the weight of the evidence.

(22) That the Court erred in permitting plaintiff to introduce incompetent, irrelevant and immaterial testimony, to which the defendant duly excepted.

(23) That the Court erred in refusing to permit the defendant to offer competent, relevant and material testimony, to which the defendant duly excepted.

(24) That the Court erred in overruling the defendant's exceptions to the award of the viewers.

LEAHY, WALTHER, HECKER & ELY,
and J. L. LONDON,
Attorneys for Defendant William H. Danforth.

Endorsed: Filed July 14, 1937. Jas. J. O'Connor, Clerk.

195 Disclaimer of Northwestern Mutual Life Insurance Company, a corp., and Petition for Dismissal of Proceedings as to said corporation and Wilbur E. Hoag, parties defendant.

(Filed October 19, 1937.)

In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716. vs. (As to Tract No. 243)
Beatrice McDaniel, et al., Defendants.

Comes now Northwestern Mutual Life Insurance Company, a corporation, one of the defendants named in the above entitled Case No. 716, as to Tract No. 243, as a party defendant, it being alleged in the petition of the plaintiff, and indicated in the judgment rendered in this cause as to Tract No. 243, that the said Northwestern Mutual Life Insurance Company, a corporation, was cestui que trust in four certain deeds of trust, as follows; to-wit:

A certain deed of trust dated May 28, 1920, filed June 8, 1920, and recorded in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 1, 1920, filed June 18, 1920 and recorded in book 60 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 14, 1920, filed June 24, 1920, recorded in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

A deed of trust dated June 14, 1920, filed June 22, 1920, recorded in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

That prior to the rendition of said judgment in condemnation as aforesaid, releases of deeds of trust were made, executed and filed in the office of the recorder of deeds of Mississippi County, Missouri, as follows, to-wit:

As to the deed of trust aforesaid, recorded in book 69 at page 118, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 147 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 118 of the records of Mississippi County, Missouri;

196 As to the deed of trust aforesaid, recorded in book 69 at page 124, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 146 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 124 of the records of Mississippi County, Missouri;

As to the deed of trust aforesaid, recorded in book 69 at page 128, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated April 27, 1935, filed May 1, 1935, and duly recorded in book 118 at page 56 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 128 of the records of Mississippi County, Missouri;

As to deed of trust aforesaid, recorded in book 69 at page 126, a release of deed of trust with presentation of notes secured thereby as required by law, said release being dated June 11, 1935, filed July 3, 1935, and duly recorded in book 118 at page 145 of the records of Mississippi County, Missouri, the same being a release in full of the obligation secured by said deed of trust recorded in said book 69 at page 126 of the records of Mississippi County, Missouri;

That at the time of release of said respective deeds of trust as aforesaid, your petitioner, Northwestern Mutual Life Insurance Company, a corporation, was the sole owner and legal holder of said respective deeds of trust and the notes secured thereby, and that subsequently thereto your petitioner had no further interest whatsoever in the aforesaid condemnation proceeding or in said Tract No. 243 described in Case No. 716 or in the proceeds of any judgment that might be

rendered or that has since been rendered as aforesaid, as to said Tract No. 243;

That your petitioner has been named in said judgment rendered as to said Tract No. 243 and entered on April 23, 1937 in said Case No. 716 in this court, together with Wilbur E. Hoag, the said Wilbur E. Hoag being named as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in each of the four respective deeds of trust specifically above described and heretofore released by your petitioner on the dates aforesaid; and that because of the aforesaid releases in full made, executed, filed and recorded respectively, as indicated, and covering the four respective deeds of trust described aforesaid in which your petitioner was named as a party defendant as to Tract No. 243 in Case No. 716 in this court, your petitioner, Northwestern Mutual Life Insurance Company, a corporation had no right, title or interest whatsoever in and to said Tract No. 243 on April 23, 1937, the date of rendition of the judgment aforesaid, and no right, title or interest whatsoever in and to the proceeds of judgment for damages in solido, which formed a part of the aforesaid judgment in condemnation rendered on April 23, 1937;

And that because of the premises your petitioner, Northwestern Mutual Life Insurance Company, a corporation, disclaims any and all right, title and interest whatsoever in and to the proceeds of judgment rendered on April 23, 1937 in the sum of \$17,921.70, in solido, and states that said condemnation proceedings should be dismissed as to said Northwestern Mutual Life Insurance Company, a corporation, and as to said Wilbur E. Hoag, trustee for Northwestern Mutual Life Insurance Company, a corporation, in the aforesaid four described released deeds of trust;

Wherefore, your petitioner, the Northwestern Mutual Life Insurance Company, a corporation, prays that the said Cause No. 716, as to Tract No. 243 may be dismissed as to said petitioner, Northwestern Mutual Life Insurance Company, a corporation, and as to Wilbur E. Hoag, trustee for your petitioner, in the aforesaid described deeds of trust which have been heretofore released as indicated in the premises.

**NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY, a corporation,**

By H. D. Thomas, Vice-President.

Dated this, the 12th day of October, 1937.

Filed Oct. 19, 1937. Jas. J. O'Connor, Clerk.

198 (Order Overruling Motions of Plaintiff and William H. Danforth for New Trial.)

November 30, 1937.

Now comes the United States by the United States Attorney and Defendant Danforth by his Attorney and the motions, heretofore filed, of plaintiff and defendant Danforth for a new trial as to tract No. 243 are now taken up for hearing and submitted to the Court and by the Court overruled. Exceptions allowed both plaintiff and defendant Danforth.

199 .

Petition for Appeal

(Filed February 26, 1938)

In the District Court of the United States for the
Southeastern Division of the Eastern
Judicial District of Missouri

United States of America, Plaintiff,
No. 716 vs. Tract #243.
Beatrice McDaniel, et al., Defendants.

Comes now William H. Danforth, one of the defendants in the above entitled cause, and conceiving himself aggrieved by the final judgment herein, which was made and took effect on to-wit: November 29, 1937, hereby appeals from said judgment and all orders and proceedings had in said cause, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in his Assignment of Errors filed herewith; and he prays that this appeal may be allowed, and a transcript of the record, proceedings, and papers, upon which the judgment herein was made and based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioner further prays that the proper order relating to security for costs required for him be made and entered herein.

WM. H. DANFORTH,
Defendant.

J. L. LONDON
Attorney for Defendant.

Leahy, Walther, Hecker & Ely William H. Danforth.
Of Counsel.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

200

Assignment of Errors
(Filed February 26, 1938)

Now comes William H. Danforth, one of the defendants in the above entitled cause, and assigns the following errors, which the said defendant avers were committed in connection with the trial of the above entitled cause, to the prejudice of the said defendant, and upon which the defendant will rely in the prosecution of the appeal in the above entitled cause:

1. The Court erred in failing and refusing to sustain the motion of William H. Danforth, on April 22, 1937 and on April 23, 1937, to enter judgment for \$31,681.98 in favor of defendants.

2. The Court erred in failing and refusing to enter up a judgment for an easement to flowage rights in favor of plaintiff and a judgment in the sum of \$31,681.98 and interest in favor of the said defendant.

3. The Court erred, on October 21, 1935, in overruling the motion of defendant, William H. Danforth, as amended, to vacate the award of the viewers to set aside the findings of fact, the interlocutory decree, the appointment of viewers, and for judgment in the sum of \$31,681.98, and interest, to which action of the Court the said defendant, William H. Danforth, duly excepted.

4. The Court erred, on October 18, 1934, in overruling the motion of defendant, William H. Danforth, to vacate the award of the viewers, to set aside the appointment of the viewers, and for judgment in the sum of \$31,681.98, which sum had been duly agreed upon by plaintiff and defendant, William H. Danforth, to which action of the Court the defendant, William H. Danforth, duly excepted.

5. The Court erred in overruling, in part, the motion of defendant, William H. Danforth, to amend the exceptions, which motion was filed on or about the 12th day of October, 1934, which ruling, filed October 12, 1934, reads as follows:

Memorandum

October 12, 1934

United States of America, Plaintiff.
Case No. 716 vs. Tract No. 243
Beatrice McDaniel, et al., Defendants.

Motion of defendant Danforth to amend exceptions filed.
Parties appear through their counsel. Motion argued and.

submitted. That part of motion on page one, beginning with line 6 of body of motion reading as follows:

"That the said commissioners were without jurisdiction or power to render an award; and for the further reason that the plaintiff and the defendant William H. Danforth reached an accord as to the damages and had made a written contract prior to the appointment of the said Commissioners and prior to the filing of the said award, to-wit: on the 2nd day of March, 1932, under the terms of which contract the said plaintiff and the said defendant William H. Danforth, as owner of Tract No. 243 had agreed in writing upon settlement for damages to Tract No. 243 in the sum of \$31,681.98, through a letter written by the plaintiff, through its duly authorized agent, dated January 14, 1932; that the said offer was duly accepted by the defendant William H. Danforth on March 2, 1932, under the terms of which contract only friendly condemnation proceedings were to be instituted, with the request for an agreed verdict, and for the purpose of clearing title; that the said offer and acceptance were in the following language, to-wit:

Subject: War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

202 To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred [eightt-one] and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as this title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Incls.—

BREHON SOMERVELL

Tract map: Major, Corps of Engineers,
General Map of floodway; District Engineer.
Addressed return envelope

Accepted:

WM. H. DANFORTH

(Owner)

c/o Purina Mills

St. Louis, Mo.

(Address)

March 2, 1932

(Date)."

That the said sum of \$31,681.98 should be paid into the Court by plaintiff under the law and under the said contract of settlement. That in accordance with the terms of the said written contract the said defendant herewith tenders into Court title to the said easement as prayed in plaintiff's petition, conditioned upon payment by plaintiff into Court of the said sum of \$31,681.98 for the benefit of the defendants as their interest may appear in the said cause.

203 That part of motion above set out is overruled on the ground that the matter pleaded in said motion has no place in the exceptions to award. Said defendant Danforth excepts to the ruling of the Court in refusing to permit the said amendment.

That part of the motion beginning on bottom of page two, beginning at line four from bottom thereof, and on page 3, reading as follows:

That the award of the commissioners is based upon speculation.

Said defendant also desires to amend the prayer by striking the following part of the prayer:

and that new commissioners be appointed in accordance with the law."

and substituting therefor after the word 'aside,' in the second line of the prayer the following:

and that either new commissioners be appointed with instructions from the Court to enter up an award in the said sum of \$31,681.98, to be affirmed by the Court, or that the Court enter up judgment in the sum of \$31,681.98 in favor of the defendants and against the plaintiff, and that the Court enter a decree in favor of plaintiff and against the defendants for the perpetual easement prayed in plaintiff's petition,

sustained, and said amendments may be made as requested, to each of which said amendments the plaintiff separately excepts.

L. JOHN WEBER,

Special Assistant to the
United States Attorney
Attorney for the Plaintiff.

Dated October 12, 1934"

204 6. The Court erred in appointing viewers and in recognizing the right of the viewers to act in either making or filing a report or an award or in taking any steps other than entering up a judgment in the said sum of \$31,681.98, together with interest.

7. The Court erred in appointing on or about the 10th day of April, 1936, viewers as to the said Tract #243, the said viewers being Stephen Barton, J. H. King, and J. E. Schmucke, and erred in subsequently re-appointing said viewers as above set out, on November 28, 1936.

8. The Court erred in receiving the report of the said Viewers Stephen Barton, J. H. King, and J. E. Schmucke as to Tract #243, on or about the 29th day of May, 1936, and also erred in receiving the report of the said viewers under date of March 11, 1937, as above set out.

9. The Court erred in overruling the defendant's exceptions to the award of the viewers.

10. The Court erred in striking from the files, on October 15, 1934, the answer and counterclaim of the defendant, William H. Danforth, as to Tract #243, to which action of the Court the said defendant, William H. Danforth duly excepted.

11. The Court erred in failing and refusing to enter up a judgment for the easement in favor of the plaintiff and in the sum of \$31,681.98 in favor of said defendant, William H. Danforth, after the contract entered into between the plaintiff and this defendant was pleaded and offered in evidence, which said contract consisted of correspondence, and under which correspondence the plaintiff and the defendant, William H. Danforth, had reached an accord as to the extent of the damages and had entered into the said written contract by correspondence prior to the appointment of any viewers in the cause, and more particularly prior to the appointment of the said viewers, Stephen Barton, J. H. King, and J. E. Schmucke; that in the said contract the said plaintiff and said defendant, William H. Danforth, had agreed upon a settlement for damages by reason of the flowage easement as to Tract No. 243 in the sum of \$31,681.98; that the said contract was in the form of an offer made by the plaintiff, through its duly authorized agent, which offer was dated January 14, 1932; that the said offer, upon request of the said defendant, William H. Danforth, was duly extended by plaintiff, and was duly accepted by the defendant, William H. Danforth, on March 2, 1932, within the time allowed by plaintiff for acceptance; that under the terms of the said contract only friendly condemnation proceedings were to be instituted, with a request to the Court for an agreed verdict, and merely for the purpose of clearing title; that the said written offer and acceptance were in the following words and figures, to-wit:

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of

Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer.

206 Payment cannot be made without Court action as this title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incs.

Traet map:

General Map of floodway:

Addressed return envelope

Accepted:

WM. H. DANFORTH,
(Owner)

c/o Purina Mills,

St. Louis, Mo.

(Address)

March 2, 1932.

(Date)."

The following letter was written by the Government extending to the time limit for acceptance to March 15, 1932:

Address Reply to

District Engineer

U. S. Engineer Office,

1006 McCall Building,

Memphis, Tenn.

War Department

U. S. Engineer Office

1006 McCall Building,

Memphis, Tenn.

February 11, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—
Flowage—New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Missouri.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,

(Signed) BREHON SOMERVELL,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

cc. to 1st area."

207 12. Because the said viewers and each of them were without jurisdiction or power to make, render, or file an award.

13. Because the Court was without jurisdiction and power to appoint the viewers under the undisputed facts as shown by the pleadings and the evidence.

14. Because the Court erred during the trials of the cause in overruling the motion for judgment, which was renewed at each hearing of the cause, and was kept alive throughout all of the proceedings, the said defendant always taking the position that he was entitled to judgment in the sum of \$31,681.98, and the Court throughout the trials and hearings refusing to enter judgment, in accordance with the various motions made by said defendant for said judgment in said amount.

16. The Court erred at the trial on October 23, 24, and 25, 1935, in refusing to allow the defendant to introduce depositions taken in Washington, D. C. of General Edward M. Martin and of Patrick J. Hurley, the Court saying:

"Well, it is my judgment, Mr. London that this is not competent evidence in the case. The government is not to be bound by the admission of its officers and their acts. You may make your record and save your point in any way you can and you may make an offer of proof covering these mat-

ters. But, the Court will sustain the objection to the offer of this deposition.

Mr. London: Very well Your Honor. I assume Your Honor intends that to apply also to the testimony of the Secretary of War, Patrick J. Hurley, whose deposition I want to offer in the same way, and Major Brehon Somervell, whose deposition I want to offer. They are all together.

Mr. Dyott: The same thing Your Honor.

The Court: Sustain the objection.

To which action and ruling of the Court the defendant by counsel then and there duly excepted at the time and still excepts.

Mr. London: May I make an offer of proof, Your Honor!

The Court: Yes, sir."

208 The depositions of Patrick J. Hurley, Secretary of War, and Major-General Edward M. Martin, were then offered, and upon objection were refused by the Court, exceptions being saved.

Because of the aforesaid errors the defendant prays that the Court below be instructed by this Court to enter judgment in the sum of \$31,681.98, together with interest.

J. L. LONDON,
Attorney for Defendant,
William H. Danforth.

Leahy, Walther, Hecker & Ely,
Of Counsel.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

209 Order Allowing Appeal.

(Filed February 26, 1938.)

Now comes defendant, William H. Danforth, and files his Assignment of Errors, Petition for Appeal, Citation, and his Appeal Bond in the sum of Two Hundred Fifty Dollars (\$250.00).

It is thereupon ordered that said defendant be and is hereby allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit; that said appeal bond be and the same is hereby approved, and that said defendant, William H. Danforth, be and is hereby allowed until April 7,

1938, in which to file his transcript on appeal in the United States Circuit Court of Appeals for the Eighth Circuit, and that the Clerk certify a transcript to said United States Circuit Court for the Eighth Circuit as required by the statutes and rules.

Done at St. Louis, Missouri, this 26th day of February, 1938. o

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

210 Bond On Appeal.

(Filed February 26, 1938.)

Know All Men By These Presents, That we, William H. Danforth, as principal, and Massachusetts Bonding & Insurance Company, a corporation, as surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said United States of America, its heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 25th day of February, in the year of our Lord one thousand nine hundred and thirty-eight.

Whereas, lately at the April Term, A. D. 1937, of the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri, in suit pending in said Court, between United States of America, Plaintiff, and Beatrice McDaniel, et al., Defendants, being cause #716, Tract #243, judgment was rendered against the said plaintiff, United States of America, in the sum of \$17,921.70, which said judgment became final on the 29th day of November, 1937, at the October Term, 1937, of the said Court, upon the overruling of the motions for new trial filed by defendant, William H. Danforth, and by plaintiff, 211 during the said term, and on the said 29th day of November, 1937, and the said William H. Danforth has obtained leave of said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing said United States of America to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date of said Citation.

Now the Condition of the Above Obligation is Such, That if the said William H. Danforth shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his appeal, then the above obligation to be void, else to remain in full force and virtue:

Sealed and delivered in presence of—

WILLIAM H. DANFORTH,

Principal,

MASSACHUSETTS BONDING &
INSURANCE COMPANY,

By John L. Patterson, Attorney-in-Fact.
Surety.

Approved by

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

212 (Order February 26, 1938, Extending Time to File Bill of Exceptions, Etc.)

(Filed February 26, 1938.)

Now on this day comes the defendant, William H. Danforth, by attorney, and on his application said defendant, William H. Danforth, is granted 30 days from this date within which to file Bill of Exceptions. The term is extended as to this case for Ninety Days from this date.

Dated this 26th day of February, 1938.

CHARLES B. DAVIS,
United States District Judge.

Endorsed: Filed Feb. 26, 1938. Jas. J. O'Connor, Clerk.

213 (Order, March 15, 1938, Extending Time For William H. Danforth to File Praecept for Transcript.)

Entered March 15, 1938.

Now on this day is filed order granting defendant, William H. Danforth, 15 days additional in which to file praecipe.

- 214 (Order, March 22, 1938, Further Extending Time For William H. Danforth to File Praeipé For Transcript.)

Entered March 22, 1938.

Now on this day is filed order granting defendant, William H. Danforth, 15 days additional in which to file praecipe.

- 215 (Order, March 22, 1938, Further Extending Time to File Bill of Exceptions and Extending Time to File Transcript.)

(Filed March 22, 1938.)

On application of defendant, William H. Danforth, and for cause shown, the said defendant is hereby granted up to and including April 27, 1938, within which to file his bill of exceptions, and is also granted up to and including May 7th in which to file his transcript, in the above entitled matter.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed March 22, 1938. Jas. J. O'Connor, Clerk.

- 216 (Order, March 30, 1938, Further Extending Time For William H. Dnaforth to File Praeipé For Transcript.)

(Filed March 30, 1938.)

Upon application of defendant, William H. Danforth, for additional time within which to file praecipe, said defendant William H. Danforth, is herewith granted fifteen (15) days additional from and after March 30, 1938, within which to file praecipe in the above entitled matter.

CHARLES B. DAVIS,

Judge.

Endorsed: Filed March 30, 1938. Jas. J. O'Connor, Clerk.

- 217 (Stipulation that Motions for New Trial may be considered as part of Bill of Exceptions, etc.)

(Filed April 16, 1938.)

It is hereby stipulated by and between the parties to the above entitled cause, through their respective counsel, that the motions for new trial filed by the plaintiff and defendant need not be rewritten here but may be considered as part of

this bill of exceptions by reference to the motions for new trial of both plaintiff and defendant, which are called for by the praecipe and are set out in the record.

JOHN WEBER, Special Attorney De-
partment of Justice,

Attorney for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed Apr 16, 1938. Jas. J. O'Connor, Clerk.

218 (Stipulation that Plaintiff May Have Additional Time
For Filing Counter-Praecipe For Transcript.)
(Filed April 18, 1938.)

It is hereby stipulated by and between the parties to the above entitled cause, to-wit, the United States of America, Plaintiff, and William H. Danforth, Defendant, through their respective counsel, that the Plaintiff, the United States of America, may have, and that the Court may order that said Plaintiff may have ten days additional time from and after April 19, 1938, within which to file its counter-praecipe in the above entitled matter.

L. JOHN WEBER, Special Attorney
Department of Justice,

Attorney for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed Apr. 18, 1938. Jas. J. O'Connor, Clerk.

219 (Stipulation For Further Extension of Time For Fil-
ing Bill of Exceptions and Transcript, etc.)
(Filed April 23, 1938.)

Whereas, the Department of Justice at Washington, D. C., desires to have an opportunity of looking over the bill of exceptions in the above entitled cause, And,

Whereas, plaintiff deems it necessary to forward a copy of the same, together with other documents called for by the praecipe, which has been filed by the defendant in this cause, to the Department of Justice at Washington, D. C.,

Now, Therefore, in consideration of the premises and for the reasons set out above, It Is Hereby Stipulated and Agreed by and between the parties, through their respective counsel, that the time for the filing of the bill of exceptions and for the filing of the transcript on appeal may be extended up to and including May 24, 1938, And It Is Further Agreed that this may constitute a joint request to the Court to extend the time for the filing of the said bill of exceptions and for the filing of the transcript on appeal.

April 22, 1938.

JOHN C. DYOTT,

Atty. For Plaintiff,

L. JOHN WEBER,

Special Atty. Dept. of Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,

William Danforth.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

220 (Stipulation As To Time For Filing Objections to
Bill of Exceptions by Plaintiff.)

(Filed April 23, 1938.)

It is hereby stipulated and agreed, by and between the above parties, through their respective counsel, that the plaintiff, the United States of America, may have up to and including May 21, 1938, in which to file its objections to the bill of exceptions heretofore lodged with the Clerk of the United States District Court at Cape Girardeau, Missouri.

April 22, 1938.

JOHN C. DYOTT,

Attorney for U. S. Engineers' Office, Memphis.

L. JOHN WEBER,

Special Atty. Dept. of Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,

William H. Danforth.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

- 221 (Order, April 23, 1938, Extending Time for Plaintiff to File Objections to Bill of Exceptions and Further Extending Time to File Bill of Exceptions and Transcript.)

(Filed April 23, 1938.)

For good cause shown, and pursuant to stipulation between the parties, plaintiff is granted up to and including May 21, 1938, in which to file objections to the bill of exceptions heretofore lodged in Court, and defendant, William H. Danforth, is granted up to and including May 24, 1938, in which to file the bill of exceptions, and in which to file the transcript on appeal.

CHARLES B. DAVIS,

Judge.

4-22-1938.

Endorsed: Filed Apr. 23, 1938. Jas. J. O'Connor, Clerk.

- 222 (Order, May 23, 1938, Further Extending Time to File Bill of Exceptions and Transcript, etc.)

(Filed May 23, 1938.)

For good cause shown, the Term of Court in the above styled case heretofore extended on February 26, 1938, for a period of ninety (90) days, is further extended for an additional period of ninety (90) days from and after May 27, 1938, to August 25, 1938.

The defendant, William H. Danforth, is granted sixty (60) days additional up to and including July 25, 1938, in which to file both the bill of exceptions and the transcript on appeal.

Plaintiff, United States of America, is granted up to and including June 1, 1938, in which to file objections or proposed amendments to the bill of exceptions.

CHARLES B. DAVIS,

Judge.

Dated: May 21, 1938.

Endorsed: Filed May 23, 1938. Jas. J. O'Connor, Clerk.

- 223 (Stipulation For Further Extension of Time to File Bill of Exceptions and Transcript.)

(Filed May 23, 1938.)

It is hereby stipulated by and between the parties, through their respective counsel, that the terms of the above entitled

cause may be extended for an additional ninety (90) days from and after the expiration of the present term of the said cause, on to-wit: May 27, 1938, to and including August 25, 1938; that the defendant, William H. Danforth, may have sixty (60) days additional from and after the 24th day of May, 1938, in which to file the bill of exceptions, and also the transcript on appeal.

It is also agreed and stipulated by and between the parties that the plaintiff, the United States of America, may have up to and including June 1, 1938, in which to file any objections or proposed amendments to the bill of exceptions.

L. JOHN WEBER,

Special Atty. Dept. of Justice,

JOHN C. DYOTT,

Atty. U. S. Engineers' Office.
Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &

ELY & J. L. LONDON,

Attorneys for Defendant,
William H. Danforth.

Endorsed: Filed May 23, 1938. Jas. J. O'Connor, Clerk.

224 (Record Entry of Filing of Bill of Exceptions.)

Entered June 1, 1938.

Bill of Exceptions of defendant, Wm. H. Danforth as to tract No. 243, settled, signed, sealed, filed and made a part of the record in this cause.

225 Transcript of Evidence and Proceedings

(Filed June 1, 1938).

In the District Court of the United States Within and For
the Southeastern Division of the Eastern Judicial
District of Missouri

United States of America, Plaintiff,
Cause No. 716 vs. Tract No. 243.
Beatrice McDaniel, et al., Defendants.

Be It Remembered, That the above styled cause came on for hearing and was heard in the District Court of the United States, within and for the Southeastern Division of the Eastern Judicial District of Missouri, at Cape Girardeau, Missouri, before the Honorable Charles B. Davis,

Judge, on the 21st and 22nd days of April, A. D. 1937, and the following proceedings were had:-

Appearances

John C. Dyott, Esq.,

Special Assistant to the United States Attorney, and

L. John Weber, Esq.,

Special Assistant to the United States Attorney,

For Plaintiff;

J. L. London, Esq.,

For Defendant,

W. H. Danforth.

Mr. Dyott: We are ready now, Your Honor, in the other case: There are joint exceptions, Your Honor, to the last report of the viewers; an exception by Mr. London and exception by the Government.

Mr. London: But on different grounds, Your Honor.

Mr. London: If Your Honor please, before any testimony is offered in this case for the purpose of a record, I would like to renew my Motion for Judgment in this case as heretofore made, and I assume the Court's ruling will be the same.

The Court: Overrule the Motion.

Mr. London: Note my exception.

226 It is agreed between the parties that inasmuch as certain portions of the petition and other papers and testimony hereinafter listed, are not relevant nor pertinent to any issue on appeal, that same are omitted from the precept and Transcript of the Record, to-wit:

1. Motion for leave to file petition, together with order granting same.

2. Caption and portions of petition that have no reference to Tract #243.

3. Order of publication.

4. Summons and Marshal's return. (No question has been raised about question of service or of notice of the report of the commissioners.)

5. Testimony of a number of witnesses regarding values and damages.

Mr. Dyott: The Government desires to offer the entire hearing of the last time, in October, 1936, the testimony

that the Government submitted at that time, together with the Exhibits and the Reports of the Commissioners.

Mr. London: Together with the Exhibits?

Mr. Dyott: Sure.

Mr. London: Let me understand this. Are you also offering testimony in connection with the testimony I took in Washington?

Mr. Dyott: I am including that because that was included by the Court.

Mr. London: I want to be sure about that. I renew my Motion for Judgment.

The Court: At this time the Court desires to overrule your Motion for Judgment.

Mr. London: May I save an exception, please?

227 To which action and ruling of the Court in overruling Defendant's Motion for Judgment, the defendant, by counsel, then and there duly excepted at the time and still continues to except.

In order to make known to the Court the nature of the Floodway Project, and its effect upon the Floodway Area, a brief resume of the engineering testimony offered at the trial is herewith given.

T. T. KNAPPEN, senior engineer for the Government, Memphis Engineer District, testified from a general map, showing part of southeast Missouri, Illinois, and Kentucky, in which the floodway is located, and which surrounds the floodway. He pointed out the upper Mississippi River, coming down, indicated Commerce on the map, where the hills end and the alluvial valley begins, and follows down the Mississippi River. Then he pointed out Cairo, where the Ohio River joins the Mississippi. The two combined flow from Cairo South. Then he pointed out New Madrid, located 70 miles from Cairo, or by air-line about 35 miles. Then he pointed out Charleston, located some 20 miles from Cairo. He then designated on the map the front line levee. This was the river bank levee, which starts at the hills at Commerce, and follows on down close to the bank of the river, continuing on down and close to, but on this side of New Madrid. He pointed out the levees around Cairo and the Cairo Drainage District, and from there down there were bluffs close to the east bank of the river all the way to

Hickman. From Hickman south there are levees of the Reelfoot Levee District following close to the river bank. This has created a condition of confinement in the reach of the river south of Cairo. Due to the confinement of part of the water the height of floods has been increased. A plan was adopted by Congress whereby in times of excessive floods the water will be permitted to flow over this levee, but will be

restrained from flowing further west by the back levee 228 of this floodway, which is now constructed, and which follows a line extending from Bird's Point in a generally southwesterly direction to a point on the west bank of St. John's Bayou, across from New Madrid. The existing levee is now constructed to an elevation which varies from about fifty-seven to about fifty-nine in different reaches throughout this front line. Some places it is as high as the equivalent of sixty on the Cairo gauge, which gauge is a concrete slab on the river bank, with the elevation written on an iron plate in that slab, so that you can read the elevation of the water surface in terms of zero on that gauge, so that when one says the present old levee, which follows the contour of the Mississippi River down to a point near New Madrid is between 57 and 59 feet, one means that the criterion is the Cairo gauge. In one of these it would be two feet higher than fifty-five feet, and the other, four feet, so that the equivalent of fifty-five feet on the Cairo gauge means that a flood crest that reaches fifty-five feet at Cairo, as it follows down the river, is equivalent to 55, the height which that flood crest reaches as it passes on down the river, not necessarily the height of the water down below when it is 55 on the Cairo gauge, but the height the water will be down here when this same maximum reaches the point that read 55 feet at Cairo. Witness also referred to a mean gulf level, by which is meant so many feet above the mean sea level at Biloxi, Mississippi. Zero on the Cairo gauge is at elevation $276\frac{1}{2}$ means gulf level. The effective protection which the levee affords is from 57 to $59\frac{1}{2}$. The witness referred to the back water, and stated that there was a system known as the upper St. Francois levee district system, which terminated on the east bank of St. John's Bayou.

When the levee got down to St. John's Bayou, if they had gone across to the ridge at New Madrid where a separate levee system extends, that water would have been bottled up in there so that rain water falling in that territory 229 could not get out; for that reason the levee was ended at the east bank of the Bayou and when the back levee of the floodway was constructed they terminated that levee

also on the east bank of the Bayou, so as not to again cut off this drainage water. The space between the old levee, that is, the levee on the west bank of the river and New Madrid and between the new levee and New Madrid in each case is approximately one-half a mile, so that there is one-half a mile open space where the Mississippi River may flow in or flow out. So that when the water was at bankful stage, the elevation at New Madrid would be approximately 34 on the New Madrid gauge, which is about elevation 288. At a stage of 55 at Cairo, a water surface elevation of approximately 300 mean gulf level would be attained. A day or two later it would produce a water surface elevation of that amount. In other words, the crest has to back up. It takes time to back up in that area, just as it takes time to move down from Cairo to New Madrid. It was proposed by the Project to reduce the effect of elevation of the upper 11 miles of the levee with the exception of one mile, at what is known as the Peafield Sewer, from its present elevation to the equivalent of 55 on the Cairo gauge. That would be done by cutting the top of the levee off. The levee is 15 feet high. It will be cut down to 12 or 13 feet. The present crown of the levee is about 8 feet. After it is reduced, the crown will be about 25 to 30 feet wide. Until the water gets to an elevation of 55, it will have just as much levee protection, or in fact slightly more, due to this material, than it has at the present. In that connection, the cut-off has not yet been made. It will be made sometime in the future. The same thing will be done for the lower five miles, for the purpose there of permitting any water above 55 to pass freely over the top of the levee at that end. If the water surface flow confined above 55 went to 57 say at Cairo, the water would extend further on back and would cover more land. An elevation of 230 300 feet on the Biloxi Scale was equivalent to 55 feet on the Cairo gauge. Any lands that are below 300 elevation would be subjected to flood theoretically, and if the water stayed up long enough those lands, or any part of them, would have water on them, to the extent that they were below 300 feet. The elevation that was above 300 would be above the back water territory and not affected by the back water. The reduction of the levee in the first eleven miles through the territory designated as the Fuse Plug Section would be to make lands within the area subject to overflow in general; that is, those floods, that they are now protected against, which would go over 55 feet, would not go over the present levee, because, of course, any floods that would go over the present levee would over-

flow the land anyhow, and this project would have nothing to do with these. The affected elevation of the front line levee that is going to be reduced now by the Fuse Plug Section is 57 to 57½ feet. Elevations that were taken were platted about every 500 feet. At the extreme upper end there is a difference in elevation of four and a half feet between the top of the present levee and the elevation that will be cut down. There is a difference between an 8 foot crown and a 25 foot crown. It is more the thickness of the levee that governs. The Fuse Plug Section was built with the idea that it was going to be good for 55 feet; that is, a levee which would be 100% effective up to 55 feet. A portion of the levee is built 59 and 60 feet. The average of the levee is between 58 and 59. About 3% or 4% of the levee would be below 58 feet. In other words, there is 96% or 97% of the front line levee which is 58 feet or higher. It might hold some floods at 58, and other floods at 57 might break it, but the witness thought it would be a fair statement to say that it would give effective protection between 57 and 57½ feet, taking all things into consideration. By

the same token, the Fuse Plug might go out below 55. 231 One flood exceeded the 55 foot stage on the Cairo gauge in the last fifty-three years. (The testimony of the witness was given prior to the flood of 1937, which also exceeded the 55 foot gauge.) This witness also testified that there were three floods, which, according to the estimates, would exceed 55 feet on the Cairo gauge, but which would not exceed 57½ feet on the Cairo gauge. They were in the years 1882, 1883, and 1884. Other floods of record, which would have gone over 55 feet, would also have gone over 58 feet under present conditions of confinement, so those three floods in the seventy-four year period of record would make about once in twenty to twenty-five years that this land would be subject to overflow in excess of its present hazard. In 1912, 1913, and 1927 the floods exceeded 57½ feet. Prior to 1937 the highest stage recorded at Cairo was 56.4 feet in 1927.

L. T. BERTHE, testifying for the defendant in the same case, that is, United States vs. Missouri State Life Insurance Company #605, testified that from the records beginning 1880, during the last fifty-three years, this land would be subject to overflow in excess of its present hazards about once in six or seven years, basing his opinion upon the floods of 1883, 1884, 1888, 1897, 1912, 1913, 1916, and 1927.)

This was all of the testimony offered by the Government to sustain the issues in its behalf.

Defendant W. H. Danforth's Case.

Defendant, William H. Danforth, thereupon, in order to sustain the issues in his behalf, offered and introduced the following evidence:

Mr. London: With Your Honor's permission, I would like at this time to offer the Government deed for the easement called for by the petition. If they would pay the award up to the \$31,681.98, I want the record to show then, if you will, that they pay the money in Court, if it hasn't been done heretofore.

JAMES J. O'CONNOR, the Clerk of the Court, testified that no money was paid into the registry of the Court in this case by the United States.

Defendant, Danforth, here offered Depositions taken pursuant to notice of Major General Edward M. Markham, 232 Patrick J. Hurley, and Major Brehon Somervell, at the law offices of Covington, Burling, Rublee, Acheson & Shorb, room 701, Union Trust Building, in the City of Washington and District of Columbia, before Paul J. Robertson, a Notary Public in and for the District of Columbia, on the 7th day of September, 1934, in cause No. 716 Law (Tracts 243 and 281), pending in the United States Court for the Eastern Judicial District of Missouri, Southeastern Division, cause being between the United States of America, plaintiff, and Beatrice McDaniel, William H. Danforth, et al., defendants, on the part of the defendant, William H. Danforth, pursuant to notice to take depositions and a commission to take depositions and stipulation annexed between the plaintiff and said defendant, William H. Danforth, at which were present:

Aubrey Lawrence, Esquire, Special Assistant Attorney General, on behalf of the United States of America;

J. L. London, Esquire, on behalf of the defendant, William H. Danforth;

Mr. Paul J. Robertson, the notary public and shorthand reporter.

Mr. Lawrence: Prior to the taking of my testimony, the plaintiff objects to the jurisdiction of the Court to hear or determine any matter under the counterclaim pleaded in the answer in this case, for the reason that the Court has no

jurisdiction of the subject matter and for the further reasons:

First, that the counterclaim constitutes a separate cause of action in the nature of a cross-complaint and is a suit against the United States brought without its consent and without authority of law.

Second, that the Court has no jurisdiction of the subject matter set out in the counterclaim.

Third, that, the United States, having withdrawn its offer to accept the property and pay the amount claimed by said counterclaim, is not before the Court for the purpose
233 of fixing the value of the property as set out in said counterclaim, and that there is no action pending before the Court upon which the counterclaim may be based.

Mr. London: I object, on the ground that the objection set out by the plaintiff has no place in the taking of the depositions; and on the further ground that the action is now pending before the Court, involving identically the same property involved in the counterclaim. The plaintiff has never withdrawn its demand for the easement in question, and, on the contrary, is asserting the right to the same and has voluntarily brought proceedings in this Court praying for title to the easement in the lands in Tracts 243 and 281, in Case No. 716.

Mr. London: I offer the deposition of General Edward M. Martin.

Mr. Dyott: We renew our objection to that testimony as bearing upon collateral matter; it doesn't tend to prove or disprove any evidence in this particular hearing on matters in condemnation; this is purely a hearing upon the value of the flowage easement, it being wholly a condemnation proceeding and the deposition offered has to do with a matter which has no part in the matter of values to which this hearing is entirely devoted, but to the contrary, upon an alleged contract which, if it would be pertinent at all, would be to a separate suit on a contract against the Government, and could not be enquired into in a hearing of this nature; and further, it is incompetent and irrelevant.

The Court: Overrule the objection.

Mr. Dyott: Save my exception.

MAJOR GENERAL EDWARD M. MARKHAM testified that he was Chief of Engineers, United States Army, and had been Chief

of Engineers since October of the preceding year. His predecessor was General Lytle Brown. As Chief of Engineers the witness was connected with the Flood Control Act and the projects for the Bird's Point-New Madrid Floodway, and at the time of the taking of the depositions was in charge of the work. The work was still going on. He knew Major Brehon Somervell, who was an officer of the Corps of Engineers. While Major Somervell was stationed at Memphis, Tenn., witness was not in charge of the Engineering Department of the United States Army. He was not familiar with Case No. 716, the suit in question. He knew G. B. Pillsbury, who is assistant to the Chief of Engineers, and was Assistant to the Chief of Engineers in November, 1931. The witness knew the signature of the said Pillsbury.

Witness was shown Defendant Danforth's Exhibit A, a document consisting of six sheets, numbered A-1, A-2, A-3, A-4, A-5, and A-6, respectively, and identified the signature of G. B. Pillsbury and D. O. Elliott on page A-1; of Brehon Somervell and T. H. Jackson on page A-3; of John J. Kingman and D. O. Elliott on page A-4; and of Brehon Somervell and T. H. Jackson on page A-5.

Witness was asked with reference to the usual method or way of issuing instructions through military channels to officers in the Engineering Department. Counsel for the plaintiff objected on the ground that it was immaterial and not competent to prove any issue in the case, the question being one of contract. The witness testified that the Chief of Engineers, in person or by one of his assistants, would devise, after conference, a conclusion as to what class of instructions were appropriate, and would send such, in writing usually, to the subordinate officer, signed either in person or by the Chief Engineers or signed by one of the pertinent subordinates by his authority. That these instructions would be strictly in accordance with what the witness observed on page A-1, started by General Pillsbury, and followed through the successive pages to page A-5. Witness observed nothing that was irregular or unusual in the conduct of the business of the office of Chief of Engineers.

Witness testified that General Lytle Brown is in Panama and reported for duty in Panama in December preceding the taking of the deposition; that General Lytle Brown was not under his jurisdiction, but under that of the Chief of Staff and the Secretary of War.

Witness recognized all of the signatures on the document marked Defendant Danforth's Exhibit A. His position in the Army on November 30, 1931 was Divi-

sion Engineer, Great Lakes Division. He had nothing to do with the flowage project in Missouri at that time. The Secretary of War was in charge of the project, and was in charge of the project on November 30, 1931. Instructions come from the Secretary of War, having to do with matters that appropriately would be for his approval and attention.

The witness was shown a document dated November 17, 1931, consisting of two pages, which for the purpose of the record were marked Defendant Danforth's Exhibit B, pages B-1 and B-2. He testified that he recognized General Lytle Brown's signature on there. The signature below Lytle Brown's signature, the witness thought was the signature of Patrick J. Hurley.

Q. I might state, General, that we have stipulated in this case that there is no dispute about the signatures.

A. Yes, sir.

The witness testified that by "Press Release," marked B-2, is meant, that in the office of the Chief of Engineers, and for the purpose of giving appropriate information to the representatives of the press concerned in their affairs, there is an officer who, upon conclusion of a matter of this kind, will write such a press release as is here indicated and, if pertinent and appropriate, with the approval of the Chief of Engineers or the Assistant to the Chief of Engineers, will hand such press release out to those of the press who request it. Such a press release was attached to this memorandum of November 17, 1931, which was a request to the Secretary of War by General Brown for authority to make settlements.

Mr. London: I now offer in evidence the memorandum of November 17, 1931, and the press release attached to it as the Defendant Danforth's Exhibit B.

Defendant Danforth's Exhibit B is in words and figures as follows, to-wit:

MICRO CARD

TRADE

MARK



22

39

2

1642



65



ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

WAR DEPARTMENT

OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

November 17, 1931.

Subject: Payment for flowage in the New Madrid Floodway.
To: The SECRETARY OF WAR.

To expedite the settlement of flowage easements in the New Madrid Floodway, I recommend that I be authorized to offer to the owners of lands in this floodway payment for flowage easements at the maximum rates authorized by the order of President Coolidge dated December 11, 1928, and where the appraisals of flowage now being made by the Department of Agriculture exceed the rates fixed in said order, to pay the appraised value so determined.

Lytle Brown

Lytle Brown,
Major General,
Chief of Engineers.

One inclosure (Press Release)

Approved November 25th, 1931.

Patrick Hurley
Secretary of War.

5500 (Misc. R. - New Madrid Floodway) 339

Let. to flowage mfrs. 11-17-31. mfrs.

asw.

120 1931

Eng.

November 17, 1931. *112*

P R E S S R E L E A S E

The authorized project for flood control in the Mississippi River includes a floodway for the escape of excess flood waters, extending from the vicinity of Cairo to New Madrid. The act authorizes the payment of flowage rights for additional destructive flood waters that will pass by reason of diversions of the main channel of the Mississippi River. President Coolidge, in authorizing the undertaking of this floodway, limited the price to be paid for flowage rights to 66 per cent of the then assessed value of the land for lands not ordinarily covered by the backwater of floods, and at prices ranging from 66 per cent of the assessed value of the land at the upper limit to zero at the lower limit of the backwater area within the floodway. He also authorized the purchase of land within the floodway immediately adjacent to the proposed relief section of the river-side levee (about 3200 acres) at prices not more than twice the then assessed value of the land.

To expedite the settlement of the flowage questions in this floodway, the Secretary of War has authorized the Chief of Engineers to offer to the land holders the maximum prices provided in this Presidential order. Furthermore, where such prices are less than the estimated value of the flowage easements as determined by appraisals now being made by the Department of Agriculture, the Secretary has authorized the Chief of Engineers to offer the full appraised flowage value so determined.

200

237-a I also offer in evidence the six pages marked Defendant Danforth's Exhibit A, numbered A-1 to A-6, and each of them.

Said exhibits are as follows:

DEFENDANT DANFORTH'S EXHIBIT A.
(consisting of sheets A-1, A-2, A-3, A-4, A-5, and A-6).
WAR DEPARTMENT

ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON

REFER TO FILE NO. **6500(Miss.R.-New Madrid
Floodway) 329**

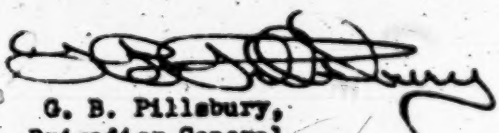
November 30, 1931.

6500(Miss.R.-New Madrid Floodway) 329
Sub. 1 Accomps.

Subject: Offers for Flowage in New Madrid Floodway.

To: The President,
Mississippi River Commission,
P.O.Box 665,
Vicksburg, Miss.

1. The Secretary of War has approved the recommendation of the Chief of Engineers that to expedite the settlement of flowage easements in the New Madrid floodway, he be authorized to offer to owners of lands in this floodway payment of flowage easements at the maximum rates authorized by President Coolidge in an order dated December 11, 1928, and where the appraisals of flowage now being made by the Department of Agriculture exceed the rates fixed in said order, to pay the appraised value so determined.
2. Offers to land owners will be made accordingly as fast as the appraisals for flowage for the tracts have been completed by the Department of Agriculture. These offers are necessarily contingent upon clear title. The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the court for an agreed verdict awarding the sums offered.
3. It is desired that the reports by the District Engineer showing the status of the appraisals being made, be amplified to include tabulations showing what is being done with respect to the offers directed above.


G. B. Pillsbury,
Brigadier General,
Acting Chief of Engineers.

3229/102/62

1st Ind.

wt

Office, President, Mississippi River Commission, Vicksburg, Miss., Dec. 7,
1931 - to the District Engineer, U. S. Engineer Office, Memphis, Tenn.

Subject: Offers for Flowage in New Madrid Floodway.

2d Ind.

U. S. Engineer Office, Memphis, Tenn., Dec. 15, 1931 - To the Chief of Engineers, U. S. Army (through the President, Mississippi River Commission, Vicksburg, Miss.).

1. Pursuant to instructions contained in paragraph 2 of basic letter, offers are being prepared covering all tracts in the Bird's Point-New Madrid Floodway on which settlement has not yet been reached. These will be mailed shortly after Jan. 1, 1932, the date on which appraisals now being made by the Department of Agriculture will be completed. Action cannot be taken by the Court on these until the April session.

2. Prior to issuance of these offers it is desired to invite attention to the following:

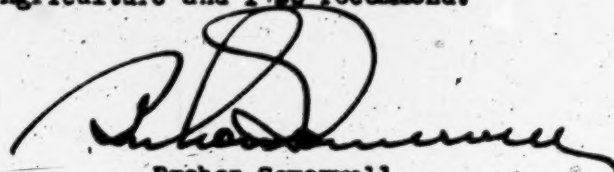
a. Previous offers made by the Department were not the maximum authorized by President Coolidge but those covered by a schedule approved by the Chief of Engineers under date of March 13 and April 30, 1929. Copy of this schedule is inclosed marked "A". It will be noted that the schedule provides for payment of the maximum authorized by President Coolidge only on the farm lands and not the timber land in the backwater (country similar to that recently inspected by the Chief of Engineers). The total amount of the offers previously made equals approximately \$1,800,000. The amount directed to be paid in basic communication based on appraisals to date is estimated at \$2,715,815, or an increase of \$915,815. On the 21 Gilchrist tracts in the back water the offer directed in letter of November 30 amounts to \$410,712. The previous offers amounted to \$87,255.37, making an increase of \$323,456.63 or about 400%. The advance figure furnished by the Department of Agriculture as to the actual value of flowage over this land is \$28,770.20, or 1/15, approximately, of the amount which the Chief of Engineers proposes to offer for these easements.

b. Based on the completed appraisals by the Department of Agriculture (460 tracts out of 660), the total value of flowage easements in the floodway is \$1,632,415, or \$1,083,400 less than the amount ordered to be paid in the letter of November 30. Final appraisals on the remaining tracts may increase this difference.

3. In view of the wide discrepancy between the amounts fixed in basic letter (in one case a ratio between the price to be offered and the actual value of 15 to 1 or \$323,456.63), it was thought that these facts should be brought to the attention of the Chief of Engineers before the actual offers were made.

DEFENDANT DANFORTH'S EXHIBIT A-3.

4. It is believed that the Department should not agree prior to Court action to any figure greater than that determined by the corps of experts furnished by the Department of Agriculture and I so recommend.



Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incl. - Schedule "A".

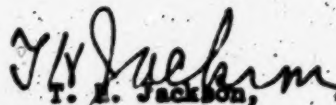
5229/102/82

3d Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi —
December 18, 1931 — To the Chief of Engineers, U.S. Army, Washington, D.C.

1. Forwarded.



T. E. Jackson,
Brig. Gen., Corps of Engineers,
President of the Mississippi
River Commission.

Encl.

Schedule "A".

6500 (Miss. R. New Madrid Floodway) 338

Subject: Offers for Flowage in
the New Madrid Floodway.

4th Ind.

Office, C. of E., December 22, 1931.-- To the President, Mississippi River
Commission, Vicksburg, Miss.

Copy of the order of President Coolidge dated December 11, 1928, is
attached. Offers will be made, as directed, for payment of flowage easements
over lands above and over lands included in the backwater area respectively,
at the maximum respective rates authorized in the order. Attention is
invited to the provisions of the order under which the maximum rates vary
according to location in the backwater area. Where appraisals of flowage
now being made by the Department of Agriculture exceed the rates fixed in
said order, offers will be made to pay the appraised value so determined.

By direction of the Chief of Engineers:


John J. Ringham,
Lieut. Col., Corps of Engineers.

One inclosure.

3229/102/82

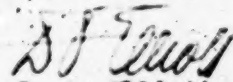
5th Ind.

IC

Office, President, Mississippi River Commission, Vicksburg, Mississippi,
December 26, 1931 - To the District Engineer, Memphis Engineer District,
Memphis, Tenn.

1. To note and return.

For the President of the Mississippi River Commission:


D. O. Elliott,
Major, Corps of Engineers,
Assistant to the President, M.R.C.

1 encl.

6500 (Miss. R. New Madrid Floodway) 338 Subject: Offers for Flowage in
the New Madrid Floodway.


M37/7/701

6th Ind.

U. S. Engineer Office, Memphis, Tenn., Jan. 20, 1932. - To the Chief of
Engineers, U. S. Army (through the President, Mississippi River Commission,
Vicksburg, Miss.).

1. Offers have been made as directed for all known tracts and as
shown on the inclosed tabulation (Form 104). The offers made, exclusive
of previous offers accepted and settlements made (\$26,890.48) amount to
\$2,429,335.26 or 14 3/4% of the U. S. Department of Agriculture flowage
appraisal (\$1,701,584.85). For the twenty-one Gilchrist tracts covering
20,099.41 acres the offers amount to \$394,859.51, or 1,259% of the U. S.
Department of Agriculture appraisals (\$31,355.97).

2. On about Feb. 15, 1932, or 30 days after offers were made, a
report as to acceptances received will be submitted.



Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Addl.
Incls. - Tabulation (Form 104) in
17 sheets (in dup.).

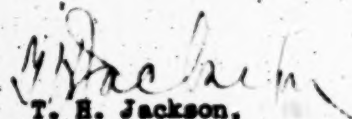
5229/102/82

7th Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi --
January 21, 1932 -- To the Chief of Engineers, U.S. Army, Washington, D. C.

1. Forwarded.



T. H. Jackson,
Brig. Gen., Corps of Engineers,
President of the Mississippi
River Commission.

JA 11 22
Sub. 2 and 1 incl. unmkd. copy.
Encls.

Copy of order of Pres. Coolidge, dated
December 11, 1928;

Tabulation (Form 104) in 17 sheets, in dupl.

DEFENDANT DANFORTH'S EXHIBIT A-6.

6500(Miss. E. New Madrid Floodway) 11/16/1

"A"

NEW MADRID FLOODWAY

Schedule for making flowage offers approved by C. of E. March 13, 1929,
and April 30, 1929.

Above Backwater.

Classification of Land.	Maximum price authorized
1 - Lakes, open water, etc.	: None
2 - Swamps and marsh land.	: Flat rate \$1 per acre.
3 - Timber land.	: 10% of assessed value
4 - Cut-over land.	: 40% of assessed value
5 - Farm land:	:
Class A (cultivated)	: 60% of assessed value
Class B (not cultivated)	: 60% " " "
6 - Town and village property	: By special agreement and authority
	: in each case.
7 - Industrial property.	: "
8 - Schools and churches.	: "

In Backwater.

1 - Lakes, open water, etc.	: None
2 - Swamps and marsh land.	: Flat rate \$1 per acre
3 - Timber land.	: Var. from 10% of assessed value
	: to \$1 per acre.
4 - Cut-over land.	: Var. from 40% to \$1.
5 - Farm land:	:
Class A (cultivated)	: Var. from 60% to \$1.
Class B (not cultivated)	: " " " "
6 - Town and village property.	: By special agreement and authority
	: in each case.
7 - Industrial property.	: "
8 - Schools and churches.	: "

44 Mr. Lawrence: The plaintiff objects to the introduction in evidence of each and all of the exhibits offered, together or separately, upon the grounds and for the reasons following:

(Objection of Plaintiff to Offer of Exhibits.)

First, that the same is irrelevant, incompetent, and immaterial and does not tend to prove any issue in the case.

Second, that the offer is made for the avowed purpose of establishing a contract which by its terms fixes the amount of compensation to be paid to defendant and the amount of judgment to be entered by the Court and precludes the Court from determining the value of the property and the amount of compensation to be awarded the land owner and is void as against public policy.

Third, that the exhibits in question are offered for the purpose of establishing an alleged contract fixing the amount of judgment to be rendered in a judicial proceeding; whereas, by the terms thereof, it is a mere contingent and conditional offer and acceptance to be submitted to the Court and is not binding on the Court and does not become a complete contract without the sanction and approval of the Court.

Fourth, that the exhibits in question are offered for the purpose of establishing an alleged contract which is void as a matter of law in that the contract in question was made without the inclusion of the clause required by section 22, Title 41, U. S. C., to the effect that no Member or Delegate to Congress is admitted to any share or part of such contract or agreement or to any benefit to arise therefrom, which said statute is applicable to contracts under the Flood Control Act by reason of Section 202(m), Title 33, U. S. C.

Fifth, that the same was made without authority of law and by persons not authorized to contract in behalf of the United States, and that if authorized to make such offer the same did not become complete until accepted and approved by the Secretary of War.

Sixth, that prior to the submission of the same to the Court for approval and before any judicial action thereon the same was withdrawn and any alleged contract therefore did
245 not become complete or binding upon the parties thereto.

Seventh, that no condemnation proceeding following the offer and acceptance has been had; that the United States

refused to pay the amount fixed; and that the proceeding being a mere inquisition to determine the value of the property for the purpose of ascertaining whether the Government would pay such price or accept the property, was withdrawn.

The witness was asked with reference to a document consisting of four pages, to which were attached six pages of figures relating to offers made at maximum under order of President Coolidge, considered excessive, with recommendation of fair and reasonable offers, and he identified on page 2 the signatures of Lytle Brown, Chief of Engineers, and of Patrick J. Hurley, Secretary of War, and on page 3 the signatures of John J. Kingman, Lieutenant Colonel, Corps of Engineers, and of W. M. Hoge, Major, Corps of Engineers, and on page 4 the signature of T. M. Jackson, Brigadier General, Corps of Engineers. He stated he was seeing those figures tabulated for the first time.

Mr. London: We will mark those documents Defendant Danforth's Exhibit C, and number the pages C-1 to C-10, inclusive. I am not offering those in evidence. I am simply identifying them.

(The documents so produced and identified are filed with the deposition, marked by the notary Defendant Danforth Exhibit C, sheets C-1 to C-10, for identification.)

A. (Continued) If you wish comments on these tables they appear to be normal tables, such as would pass through the office of the Chief of Engineers in conjunction with the basic file.

The witness identified the letter dated November 16, 1934, and stated he had seen little of the signature of Kelton and would be unable to identify it upon this letter; that if a presumption was worth anything he thought that was the signature of Edwin C. Kelton. This letter was marked Defendant Danforth's Exhibit D.

On Cross-Examination General Markham testified over defendant's objection, that the question called for a conclusion, and on the ground that the instrument speaks for itself, that Exhibit A, in its various parts, what is known as an inter-departmental transaction. It was solely a memorandum passing between the various officers of the Department, with the indorsements as they were transmitted and forwarded to other officers of the Corps of Engineers, subject to whatever authoritative instructions are contained therein. So far as the witness knew, all these papers remained in the file, in control of the War Department and of the Chief of Engineers, until produced in Court.

Q. And is there anything to indicate—either in the exhibits or in your knowledge of the custom that you referred—that would tend to show that the defendant in this case had any knowledge or information with reference to this interdepartmental transaction?

Mr. London: That is objected to, because the instruments speak for themselves.

Mr. Lawrence: I speak also of the custom.

A. Unless it is stated in this file that some authoritative person of the Department has informed the defendant, I see nothing in the file per se suggestive that the defendant would have had any knowledge whatsoever.

Mr. Lawrence: The matters referred to, then, were pure matters within the jurisdiction and cognizance of the War Department?

Mr. London: I object to that, as leading and suggestive, and it is not covered by the direct examination.

A. That would appear so from the file.

Mr. Lawrence:

Q. And the same situation exists with reference to its being an interdepartmental transaction? A. Yes.

Q. The same situation applies to Exhibit B, General?

Mr. London: The same objection.

A. This would be interdepartmental, without knowledge of the defendant unless he had knowledge through the press release, being Exhibit B-2.

Witness testified that he had identified the signatures on Exhibit C. This was also an interdepartmental transaction.

Mr. Lawrence: We offer in evidence Exhibit C and all parts thereof.

Mr. London: Objected to on the ground that it is immaterial, on the ground that it is not part of the plaintiff's case, and on the grounds that it is incompetent and it was withdrawn after acceptance.

The document so offered in evidence by plaintiff was filed with the deposition, marked by the notary Defendant Danforth's Exhibit C (sheets C-1 to C-10) for identification, and further marked by the notary Plaintiff's Exhibit 1 Markham.

Said Exhibit is in words and figures as follows, to-wit:

DEFENDANT DANFORTH'S EXHIBIT C.
(consisting of sheets numbered C-1 to C-10, both inclusive)
PLAINTIFF'S EXHIBIT 1 MARKHAM.

LETTERS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

REPORT TO FILE NO. _____

April 4, 1932:

Subject: Flowage and Land in New Madrid Floodway.

To: THE SECRETARY OF WAR.

1. On August 11, 1928, President Coolidge authorized the purchase of flowage easements in the New Madrid Floodway at prices based on assessed values provided not over certain limiting prices be paid. At the same time he authorized the purchase in fee simple of the land adjacent to the relief levee (about 3200 acres) provided not over twice assessed values should be paid for these titles.

2. In 1931 the lands in the New Madrid Floodway were appraised by the Department of Agriculture both as to full values and flowage values.

3. On November 25, 1931, the Secretary of War authorized that offers be made for flowage in the floodway either at the maximum prices authorized by President Coolidge or at the appraised values of the Department of Agriculture whichever price in each case was larger, the offered prices if accepted to be presented to the court for agreed verdicts. These offers were made and in many cases they were accepted. It has developed that a number of offers made under the Coolidge authorization were so greatly in excess of actual values that it is not proper to consummate the negotiations nor to ask the District Attorney to agree to the prices offered. Fortunately only 25 offers considered excessive have been accepted.

4. This entire matter has been reviewed by the District Engineer who after consultation with the District Attorney recommends as follows:

(a) Flowage

Withdraw 113 offers made but not accepted,

Withdraw 25 offers made and accepted,

Withdraw Total 138 as shown on the attached tabulation entitled -

"Flowage cases of the New Madrid Floodway where offers made at maximum under order of President Coolidge are considered excessive with recommended fair and reasonable offers."

6500(Miss. R.-New Madrid Floodway)400
Sub. 1 accounts

File
JWK

-2-

Letter to Secretary of War.

With respect to the 113 offers not accepted to make no new offers but to plead in court for the prices shown in Column 8 of the tabulation or if approached to treat with owners on the basis of these prices.

With respect to the 25 offers accepted to make new offers and plead in court for the prices shown in Column 8 of the tabulation.

(b) Fee Simple Title

Withdraw all flowage offers (29) with respect to about 3800 acres adjacent to the relief levee as shown on attached tabulation entitled "Tracts of New Madrid Floodway lying within one half mile of upper fuse plug section of front line levee" and to make offers for the fee simple title to these lands at prices shown in Column 6 of the tabulation.

5. Authority is requested to carry out the procedure recommended by the District Engineer.

Lytle Brown

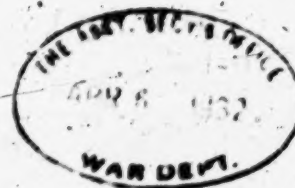
Lytle Brown,
Major General,
Chief of Engineers.

asw

Inclosure -
Tabulations

Approved April 7, 1932.

Samuel H. Hurley
Secretary of War.



Inclosure -
Tabulations.

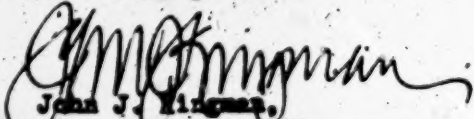
0500(Miss.R.-New Madrid Floodway)-400 Subject: Flowage and Land in New
Madrid Floodway.

2d Ind.

Office, C. of E., April 11, 1932. -- To the President, Mississippi River
Commission, Vicksburg, Miss.

Attention is invited to the action of the Department as shown
by the foregoing letter and indorsement, by which you will be guided.

By direction of the Chief of Engineers:


John J. Higgins,
Lieut. Col., Corps of Engineers.

Sub 1 accomp'g.

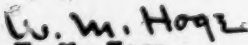
Ed Ind.

EC

Office, President, Mississippi River Commission, Vicksburg, Mississippi —
April 14, 1932 — To the District Engineer, U. S. Engineer Office, Memphis,
Tenn.

1. To note and for compliance.

For the President of the Mississippi River Commission:


W. M. Hoge,
Major, Corps of Engineers,
Assistant to the President
M.R.C.

Sub. 1 accomp'g.

15 1932

Subject: Flowage and Land in New Madrid Floodway.
6500(Miss.R.-New Madrid Floodway)-400

4th Ind.

U. S. Engineer Office, Memphis, Tenn., April 15, 1932. To
the President, Mississippi River Commission, Vicksburg,
Miss.

Noted.

BS
B. S.

Inclosure-
No change.

3220/102/118 5th Ind. IC
Office, President, Mississippi River Commission, Vicksburg, Mississippi,
April 16, 1932 - To the Chief of Engineers, U. S. Army, Washington, D.C.

1. Forwarded.

T. H. Jackson
T. H. Jackson,
Brig. Gen., Corps of Engineers,
President, Mississippi River Commission.

APR 1

Sub.1 accomp.

6500 (Hues. R. New Madrid Floodway) 400/

From a series of the New Madrid Floodway where offers made at minimum under order of President
 Coalitions are considered excessive with recommended fair and reasonable offers.

1	2	3	4	5	6	7	8	9
Tract No.	Unit No.	Acres	Pres. Coal- idge's Max. Price (Offer made)	U.S.D.A. Floodway Appraisal Amount Per Acre	Ratio Offer Per Acre	Excess of offer over Appraisal Amount Per Acre	Recom- mended Offer Amount Per Acre	Remarks 1 = Minimum of \$1.60 per acre
21		352.72	2,708.00	6,532.00:10.34	1.48	3,824.00:8.99	6,532.00	
29	549	40.00	207.00	244.00:6.10	3.98	711.40:17.81	244.00	
30	549	80.00	2,478.00	285.00:10.52	2.86	1,609.00:10.12	285.00	
32		1,680.00	38,712.00	19,850.00:11.39	1.91	17,441.90:10.31	19,850.00	
34		140.04	3,851.10	2,342.00:16.11	1.61	1,499.01:9.22	2,342.00	
35		310.05	10,012.00	8,497.00:26.78	1.12	1,065.00:2.43	8,497.00	
38	577	180.00	3,300.00	1,801.00:11.78	1.83	1,497.00:9.38	1,801.00	
39		180.00	3,900.00	2,399.00:11.06	1.47	1,500.00:9.38	2,399.00	
40		280.00	8,187.00	4,021.40:14.39	1.53	2,165.10:9.71	4,021.40	
43		207.06	3,280.00	2,304.40:12.04	2.11	2,775.60:17.38	2,304.40	
49		340.34	7,095.00	3,992.00:11.08	1.78	3,103.00:8.61	3,992.00	
100		80.00	285.00	285.00:3.59	2.79	822.00:6.62	285.00	
102	577	320.00	8,314.00	6,899.00:21.38	1.22	1,415.00:4.71	6,899.00	
106	603	743.00	19,239.00	17,099.00:22.41	1.12	2,140.00:2.80	17,099.00	
107	502	60.00	2,478.00	1,735.00:21.74	1.42	733.00:9.20	1,735.00	
112		180.00	3,300.00	1,828.00:11.04	1.71	1,372.00:9.59	1,828.00	
113	582	120.00	2,970.00	1,442.00:12.06	2.06	1,528.00:11.70	1,442.00	
114		600.00	14,817.00	11,469.00:19.11	1.29	3,347.00:5.58	11,469.00	
118		38.79	987.00	522.00:17.56	1.82	431.00:11.12	522.00	
124		80.00	1,402.00	522.00:6.57	2.68	880.00:11.01	522.00	
136	603	200.00	4,970.00	3,477.00:19.14	1.33	1,442.00:5.71	3,477.00	
137	587	240.00	6,864.00	4,680.00:19.50	1.42	2,184.00:8.27	4,680.00	
138	328	200.00	3,002.00	42.00:1.83	80.42	2,960.00:14.79	3,002.00	
139		198.36	4,118.00	804.10:4.12	8.14	3,313.90:19.00	804.10	
141		140.00	2,807.00	1,092.10:6.84	2.38	1,714.90:9.48	1,092.10	
146		100.00	2,079.00	1,185.00:11.10	1.75	894.00:8.94	1,185.00	
149	204	80.00	1,718.00	902.40:11.28	1.89	815.60:10.19	902.40	
150		280.00	6,715.00	4,887.00:16.39	1.46	2,128.00:9.20	4,887.00	
161		544.05	10,878.00	9,533.00:16.88	1.11	1,042.00:1.88	9,533.00	

DEFENDANT DANFORTH'S EXHIBIT C-5.

Tract No.	Acres	Free. Coal- Edge's Mex.	U.S.D.A. Flawage Appraisal	Ratio Offer	Excess of offer over Appraisal	Recom- mended	Remarks
		Price (Offer made)	Amount per acre	per acre	Amount per acre	Offer	Minimum of 1.00 per acre
170	603	450.00	12,474.00	9,174.00:19.11	1.36	3,299.00: 6.07	9,174.00
172		97.41	1,221.00	601.00:10.48	2.05	619.00:10.79	601.00
173	889	85.85	2,876.00	1,887.00:21.74	1.87	808.00: 5.91	1,887.00
176		87.87	2,324.00	1,642.00:18.73	1.42	684.10: 7.80	1,642.40
180		40.00	465.00	54.00: 1.37	9.07	440.40:11.01	54.00
188	604	157.82	4,024.00	1,007.00: 6.32	4.00	3,019.00:19.13	1,007.00
198	887	180.00	3,940.00	3,247.00:10.30	1.22	712.40: 4.48	3,247.80
200		240.00	6,950.00	5,085.00:13.90	1.38	1,865.00: 5.35	5,085.00
201	603	512.80	7,786.00	2,643.00: 5.19	2.85	5,143.00:10.01	2,643.40
205	604	225.73	5,544.00	3,034.00:10.89	1.76	2,511.00: 5.16	3,034.61
207		1,545.19	22,698.00	20,439.00:19.66	1.11	2,259.00: 2.10	20,439.00
214		126.00	2,970.00	943.00: 5.03	3.08	2,004.00:16.78	943.00
215		225.01	6,722.10	5,184.40:21.07	1.30	1,537.70: 6.33	5,186.40
226		32.13	680.00	178.00: 5.74	3.88	514.00:16.38	178.00
227		80.00	1,534.00	386.00: 4.83	3.97	1,148.00:14.25	386.00
229		187.10	2,779.00	2,541.00:13.88	1.47	1,187.00: 6.35	2,541.00
238		171.28	5,033.00	442.00: 2.58	11.25	4,591.00:26.01	442.00 Offer accepted.
238-1	889	160.00	1,472.00	129.00: 5.11	11.34	1,342.77: 8.39	160.00
237	889	40.00	841.97	84.70: 5.97	10.43	257.27: 6.48	40.00
243		1,023.84	31,621.00	14,825.00:14.32	1.89	14,796.00:14.33	14,825.00 Offer accepted.
244		80.00	900.00	415.00: 5.18	2.40	477.00: 7.21	415.00
246		400.00	5,325.00	3,521.00: 8.80	1.50	1,761.00: 4.40	3,521.00
250		240.00	3,338.00	1,607.00: 6.80	2.00	1,731.00: 6.36	1,607.00
254		800.00	9,879.21	6,234.00: 7.77	1.56	3,645.21: 4.33	6,234.00
254-1		378.44	10,405.18	9,189.00:24.50	1.14	1,216.18: 3.48	9,189.00
259		64.18	1,841.00	884.00: 9.10	3.19	1,277.00:19.00	884.00
260		40.00	1,266.00	63.00: 1.59	21.79	1,221.40:23.06	63.00 Offer accepted.
261	884	746.27	10,359.70	3,840.40: 4.11	5.37	7,500.10: 9.77	3,840.40
267		80.00	1,680.00	790.40: 9.88	2.13	892.00:11.16	790.40
243	887	119.90	996.19	587.00: 4.90	1.70	408.09: 3.41	587.00
268		510.80	2,722.00	24.00: -	-	2,746.70: 5.20	570.00 Offer accepted.

DEFENDANT DANFORTH'S EXHIBIT C-6.

Tract, Sub- No. : No.		Acres	Pres. Cool- ider's Mar. Price (offer made)	U.S.D.A. Pledge Amount \$	Ratio For 100 Acres	Amount of offer Offer \$	Amount Offer \$	Remarks	
269	604	242.91	4,313.93	3,001.80	12.36	1.44	1,312.13	5.40	3,001.80
272		606.25	4,136.47	37.30	.06	110.90	4,099.17	6.76	606.25
275		80.00	705.38	-25.26	-	-	730.64	9.13	80.00
279		397.92	2,161.90	80.80	.20	27.02	2,081.10	5.24	397.92
281		400.00	2,208.94	-9.48	-	-	2,218.42	5.55	400.00 offer accepted.
282		100.00	693.00	68.60	.69	10.20	624.40	6.24	100.00
283		160.00	998.13	-51.48	-	-	979.61	6.12	160.00
286		80.00	996.88	36.30	.98	12.03	960.58	6.38	80.00
306		80.00	577.30	157.85	1.97	3.66	419.45	5.25	157.85
307	13,795.17	277,807.42	23,690.25	1.72	11.75	24,157.17	23,690.25	offer accepted.	
321	604	80.00	612.96	130.80	1.64	4.68	481.76	6.02	130.80
330	989	100.00	612.96	88.60	.89	6.91	523.96	5.23	100.00
331		600.00	9,361.69	7,625.00	12.71	1.23	1,736.69	2.89	7,625.00
339	604	120.00	1,039.30	378.60	3.16	2.75	660.90	5.51	378.60
342		80.00	1,848.80	61.00	.76	30.29	1,786.80	22.34	80.00 offer accepted.
345		2,858.21	51,298.40	3,323.98	1.16	15.45	47,974.42	16.78	3,323.98 offer accepted.
345A		40.00	1,195.00	20.09	.90	57.49	1,134.91	28.57	40.00 offer accepted.
347		87.81	742.30	170.95	1.95	4.34	571.35	6.51	170.95
353		170.13	2,442.00	7,162.20	12.68	1.31	2,438.84	3.96	7,162.20
353A		394.71	6,999.04						
352		1,446.88	31,754.28	38,099.25	25.97	1.10	3,655.03	2.49	38,099.25
363		64.28	1,980.00	1,981.00	24.60	1.25	399.00	6.21	1,981.00
366	946	40.00	371.25	-14.00	-	-	385.25	9.63	40.00
371		80.00	2,772.00	129.40	1.64	21.42	2,642.60	33.03	129.40 offer accepted.
372	947	160.08	668.25	172.90	1.08	3.87	495.35	3.10	172.90
384		80.00	994.00	64.80	.82	9.05	929.20	6.60	80.00
390	991	499.51	12,461.62	11,425.80	23.87	1.09	1,035.82	2.25	11,425.80
391	948	80.00	1,732.90	1,061.00	13.26	1.63	671.90	8.39	1,061.00
397	952	80.00	1,423.12	1,020.40	12.76	1.39	402.72	5.03	1,020.40
400		393.85	10,098.00	7,703.40	19.96	1.31	2,394.60	6.08	7,703.40

DEFENDANT DANFORTH'S EXHIBIT C-7.

Tract No.	Unit No.	Acres	Pres. Coal- ledge's Max. Price (Offer made)	U.S.N.A. Flange Approval Amount \$	Ratio Offer 1 acre 100%	Excess of offer over Approval Amount \$	Excess Offer 1 acre 100%	Remarks N = Minimum of 1.00 per acre.	
838		1,136.14	6,644.11	564.60	.38	16.11	8,239.51	8.49	1,136.14
838-C		39.43	980.78	881.40	6.02	4.34	749.32	19.80	881.40
843-C	607	78.49	917.38	349.80	4.63	2.65	848.15	7.33	849.20
844		878.64	5,941.02	3,682.00	11.16	1.61	2,259.02	6.88	3,682.00
845		54.58	881.25	176.80	3.34	3.03	359.45	6.99	176.80
845	607	1,850.32	3,841.20	1,394.48	.75	2.25	1,846.74	1.00	1,850.32
878		880.00	662.99	195.70	.98	3.54	497.29	2.49	880.00
881		410.2	940.08	-135.34	-	-	1,075.42	2.68	410.2
884		400.00	783.74	-34.40	-	-	808.14	2.02	400.00
886		1,440.00	3,737.23	891.80	.62	4.19	2,845.43	1.78	1,440.00
811		109.10	858.75	-20.22	-	-	878.97	5.47	109.10
815		132.14	1,164.24	489.08	3.1	2.30	675.16	4.44	489.08
132		52,814.65	575,748.75	349,225.67	6.76	2.52	528,063.49	10.57	52,814.65
				-344.58					
142		802.93	14,784.02	4,771.80	5.94	3.10	10,012.20	12.47	4,771.80
151		680.00	8,580.00	875.40	1.29	9.60	7,704.60	11.33	875.40
185		680.00	7,084.69	2,222.10	3.27	3.19	4,862.59	7.15	2,222.10
209		625.71	10,766.25	1,663.60	2.66	6.47	9,102.65	14.55	1,663.60
334		180.00	3,314.13	1,263.55	7.02	1.83	1,050.58	5.84	1,263.55
355		217.73	4,808.10	2,805.65	12.88	1.71	2,002.45	9.20	2,805.65
138		56,001.00	974,085.95	381,831.77	6.82	2.55	592,818.76	10.57	381,831.77
				- 544.58					

7 DEPENDANT DAUFORTH'S EXHIBIT C-10.7

Flange after accepted.

... minor, efflu, aphid, leucophaea, arch 23, 1932.

258 On Redirect Examination General Markham testified that he had never seen the letter dated January 14, 1932, marked Defendant Danforth's Exhibit E, and that he was wholly unfamiliar with this form of letter, never having seen such a form before.

Q. Now, if that form of letter was sent to land owners, would you still say that that is a confidential interdepartmental communication, or does that contain the substance of the exhibits marked "A" and "B"?

Mr. Lawrence: That is objected to as incompetent and irrelevant and not tending to prove any issue in the case and as calling for a conclusion of the witness.

A. It would appear to be the next logical step following the authorizations contained in the exhibits to which you referred.

Mr. London: And would that carry out the substance of the authorization or command which was issued?

Mr. Lawrence: That is objected to as calling for a conclusion of the witness and incompetent.

A. It is my understanding that it would carry out the directives of the prior exhibits.

Mr. London: General, would you designate that as an authorization or as a military command?

Mr. Lawrence: The same objection.

Q. (Continued) I am now referring to Exhibits A and B, in which Major Somervell was either commanded or authorized to make these offers to land owners.

Mr. Lawrence: Further objected to as not being the best evidence, the instruments themselves being in evidence, and the question calling for the conclusion of the witness upon the exhibits involved.

A. I would regard the prior exhibits as being directive upon Major Brehon Somervell, whose action under such directive is typified by this letter of January 14, 1932.

Mr. London: Would you say that that letter of January 14, 1932, carried out the instructions or commands issued to Major Somervell?

259 Mr. Lawrence: The same objection.

A. I would.

Mr. London: Would you say that Major Somervell had authority to write that letter, in view of the communications which were passed on down to him from the Chief of Engineers, marked Defendant Danforth's Exhibits A and B?

Mr. Lawrence: That is objected to as calling for the conclusion of the witness not only as to questions of fact and as to interpretations of instruments but as to statutory authority, and as wholly incompetent and inadmissible.

A. I would say that he had complete authority to issue the letter of January 14th.

Mr. London: Now I offer the deposition of Patrick J. Hurley.

Mr. Dyott: Same objection.

The Court: Same ruling.

Mr. Dyott: Exception.

PATRICK J. HURLEY testified that he had been Secretary of War of the United States; that his appointment was confirmed by the Senate on December 9, 1929, and, as he recalled, he took the oath of office that same day; that he served until March 4, 1933, continuously; that as Secretary of War, the Corps of Engineers of the United States Army would be under his jurisdiction, and it was in 1931. He knew Major General Lytle Brown, who in 1931 was Chief of the Corps of Engineers of the United States Army, and he was under witness's jurisdiction in 1931.

Witness was shown a memorandum marked Defendant Danforth's Exhibit B, to which was attached a press release, marked B-2, and testified the request was made by General Brown and was approved by witness as Secretary of War No-

25. vember 25, 1931. Witness had no knowledge of the press release which was attached.

260 Witness testified that he knew Major Brehon Somervell, and knew him in 1931. He was a Major in the Corps of Engineers of the United States Army; that he thought he was in charge of the work at the New Madrid Spillway in Missouri.

On Cross-Examination witness testified that he had no understanding in connection with the press release referred to; that it was not issued by him; that it (the press release) was not published at his request.

The attention of the witness was called to the second page of Exhibit C. He identified the photostat of his signature. The word "Approved" preceding his signature indicates that he approved the withdrawal of 138 offers—

Mr. London (Interposing) Pardon me just a minute. I want to [pose] an objection to that question on the ground that the document speaks for itself. It is incompetent, irrelevant, and immaterial to any issue in this case and these steps were taken long after the offer had been accepted by the defendant Danforth.

A. (Continued) "I approved the withdrawal of 138 offers made for flowage rights in the New Madrid spillway. 113 of the offers had not been accepted. 25 of the offers had been accepted. I withdrew all the offers because they had been made on a mistake of fact and in a manner detrimental to the Government."

Mr. London: I move that that be stricken out as a conclusion of the witness and as a voluntary statement not called for by the question.

Mr. Lawrence: Q. I understand, General, you mean, then, that the withdrawal referred to by you was authorized and directed by you as Secretary of War of the United States.

Mr. London: Objected to as incompetent, irrelevant and immaterial to any issue in the case.

A. Yes, sir.

Mr. Lawrence: I offer Exhibit C as a part of the cross-examination of Mr. Hurley.

261 Mr. London: Objected to as not covered in direct examination and as not part of the defendant Danforth's case.

Mr. London: And I offer Major Brehon Somervell's deposition.

Mr. Dyott: Same objection.

The Court: Same ruling.

Exception.

MAJOR BREHON SOMERVELL testified that he lived in Washington, D. C., that he was a major in the United States Army, connected with the Engineering Department; that since his graduation from the Military Academy he has always been in the Engineering Department. In 1931 he was stationed at Memphis, Tennessee, and was there in 1932. While stationed at Memphis, Tennessee, he was District Engineer of the Engineer Corps, and had charge of all work falling within the Engineering Department, subject to the supervision of his superior officers, in an area known as the Memphis District. That included the Bird's Point and New Madrid Area. He was connected with the flowage project, and had charge of the work there. He knew Major General Lytle Brown, and knew him at that time. He was the chief of the witness. Witness took instructions from him. The position of Lytle Brown in the Army was Major General, Chief of Engineers.

Witness was familiar with the work that was done by the Engineers and by the Department of Agriculture in the Bird's Point New Madrid area. The engineers made independent appraisals of the land themselves. They hired local men to make appraisals. They secured the co-operation of the Department of Agriculture to make appraisals of the land and flowage rights in the New Madrid floodway. So that they made, really, three separate appraisals of that land. Those appraisals were all made prior to the time that they made offers to the land owners. Witness was in charge of the appraisals made by the Engineers, and he made an appraisal of tract 243. Two of the appraisals were made by the
262 same organization, that is, they looked the land over and figured out about what it was worth, and then they hired individuals up there to make reports to them on the same pieces. The Court also appointed appraisers at times on different cases. The individuals who made the appraisals were in addition to appraisers appointed by the Court. Sometimes they may have been the same men. On the other hand, they were appointed independently, the ones witness referred to. So that they had the private individuals who

de the appraisals for the Engineering Department, they l the individuals who made the appraisals for the Department of Agriculture, and they had the appraisers appointed the Court. This was true of the tract in question as it s true of every tract.

The witness was at the time the head of the field organization. The President of the Mississippi River Commission s Brigadier General Thomas H. Jackson. He was the immediate chief of witness, and witness received instructions ough him. Witness would receive these instructions from chief generally in writing, through the President of the Mississippi River Commission, and they would come down him through indorsements in military fashion. As far as e witness knew he was the only person designated to make ers to land owners.

Witness identified the signature of Lytle Brown on a memorandum dated November 17, 1931, marked Defendant Danth's Exhibit B-1, followed by a press release, marked B-2.

Witness was shown six pages marked Defendant Danforth's Exhibit A, pages A-1 to A-6, inclusive, and identified that as photostatic copy of communications passing between the Chief of Engineers and the office of witness, via channels. That s the document or the authority upon which he made these ers to the land owners. The witness then quoted from e document as follows:

"It is believed that the Department should not agree prior Court action to any figure greater than that determined the corps of experts furnished by the Department of Agriculture and I so recommend."

3 This was from the third page, marked "Ex. A 3.", dated December 15, 1931, which was prior to the time at he sent out these offers.

The witness was asked if he learned of any irregularities connection with the offer on the Danforth tract. He stated at it was not an irregularity; that it was a mistake; that regarded it as excessive; that he withdrew the offer on instructions; that the only reason that he recommended withdrawing the offer was that he thought it was too much; at he thought the offer had already been accepted on the act.

Witness was shown a letter, dated November 16, 1932, marked Defendant Danforth's Exhibit D and stated the signature of Edwin C. Kelton looked like that of Edwin C. Kelton; that Kelton was in Washington; that at the time in question Kelton was the assistant of the witness; that the letter was signed "For and in the absence of the District Engineer," and the witness presumed that he was absent, that Kelton had general authority to sign it in the absence of the witness; that he was the principal assistant of the witness.

The letter of November 16, 1932, Defendant Danforth's Exhibit D, was offered in evidence, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit D

Address Reply to
District Engineer War Department
U. S. Engineer Office U. S. Engineer Office
P. O. Box 97 P. O. Box 97
Memphis, Tenn. Memphis, Tenn. November 16, 1932

Refer to File No.

Subject: Tracts 187, 243, 281, and 327 — Flowage — New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

DEAR Sir:

I have your letter dated November 9, 1932, with further reference to the above tracts of the New Madrid Floodway.

The status of tracts 187, 243, 281 and 327 is still the same as previously set out in my letters to you, dated April 22, 1932, and subsequently.

It is planned to institute friendly condemnation proceedings in the case of tracts 187 and 327 and regular condemnation proceedings in the case of tracts 243 and 281.

For and in the absence of the District Engineer.

Very truly yours,

EDWIN C. KELTON,
Major, Corps of Engineers,
Assistant.

No. 716 Law, Tracts 243 and 281
United States of America, Plaintiff,

vs.

Beatrice McDaniel Et Al., Defendants.

Defendant Danforth's Exhibit D

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep 21 1934
Jas. J. O'Connor,
Clerk.

Counsel for the plaintiff made the same objections to the admission of Exhibit D as were made to the admission of Defendant Danforth's Exhibits A, B, and C, which objections were repeated in full.

265 In making these offers the witness based the offers upon the maximum set out in President Coolidge's order; that would be two-thirds, as witness remembered it, of the assessed valuation. This was the maximum price authorized. The witness was referring to Defendant Danforth's Exhibit A-6, a schedule, for making flowage offers approved by the Chief of Engineers, and it does not give the maximum price authorized by President Coolidge. At the time the witness made these offers, he already had all the data available regarding the tracts of land with reference to the appraisals.

Witness was shown a letter, dated January 14, 1932, marked Defendant Danforth's Exhibit E, and testified that it appeared to be in the form of the letters that were sent out, but did not have his signature on it. It had a type-written signature. It was his practice to send an original which was signed by him, and also a duplicate original, not signed by him, for the owner to keep. The witness would request the owner to sign and return the original, which was signed by the witness.

Mr. London (after discussion off the record): The plaintiff will stipulate that the offer with reference to Tract No. 281, in the sum of \$2,208.94, was sent to the defendant

Danforth in the same form as the offer which has been marked Defendant Danforth's Exhibit E, dated January 14, 1932, and was sent at about the same time.

Mr. Lawrence: That is all right.

Mr. London: I think it was exactly the same date, as a matter of fact.

Mr. Lawrence: Yes.

Defendant Danforth's Exhibit E, together with diagrams attached thereto, were offered in evidence, marked Defendant Danforth's Exhibit E, which are as follows:

DEFENDANT DANFORTH'S EXHIBIT E.
Sheets E-1, E-2 and E-3.ADDRESS REPLY TO
DISTRICT ENGINEER
U. S. ENGINEER OFFICE
1006 MCCALL BUILDING
MEMPHIS, TENN.WAR DEPARTMENT
U. S. ENGINEER OFFICE
1006 MCCALL BUILDING
MEMPHIS, TENN.

REFER TO FILE NO

JAN 14 1932

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o. Puffin Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 - - - Dollars (\$ 31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 245, as indicated on the inclosed plat, (this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Incls. -

Tract map;
General map of floodway;
Addressed return envelope.Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

268 Counsel for the plaintiff made the same objections to the admission of Exhibit E as were made to Defendant Danforth's Exhibits A, B, and C, which objections were repeated in full.

269 The witness testified to another letter, marked Defendant Danforth's Exhibit F, which was an offer made in exactly the same way, dated January 14, 1932, on Tract 187, and also to an offer made on Tract No. 281, neither tract being involved in this appeal, but which were offered for the purpose of showing that the offers were all made in the same way.

Witness was shown a letter dated February 8, 1932, to which were attached diagrams, covering Tracts 325 and 327, marked Defendant Danforth's Exhibit G, and identified his signature on the offer. These have to do with other tracts, but were offered for the purpose of showing that the same method of procedure was used by the defendant, and are not attached here in order to shorten the record. Counsel for plaintiff objected to Exhibits F and G, on the ground that they were immaterial.

Witness was shown a letter dated February 8, 1932, marked Defendant Danforth's Exhibit H, and identified it as the form on which the witness made offers. It was on the form as the duplicate original on which his typewritten signature appeared.

Witness identified letter dated April 25, 1932, marked Defendant Danforth's Exhibit I, which letter also showed the acceptance of the offer for Tract No. 327. The letter of February 8, 1932, Exhibit H, referred to the same tract No. 327.

Defendant Danforth's Exhibits H and I were offered in evidence, counsel for the plaintiff objecting on the ground that they were immaterial, and are as follows:

Defendant Danforth's Exhibit H

The form of Defendant Danforth's Exhibit H was exactly the same as Defendant Danforth's Exhibit E, the only difference being that the amount of the offer was \$1,058.06, and the tract was #327. The acceptance on Defendant Danforth's Exhibit H was in exactly the same form as in Defendant Danforth's Exhibit E. The date of acceptance was also, March 2, 1932.

270

Defendant Danforth's Exhibit I.

Address Reply to War Department
District Engineer U. S. Engineer Office
U. S. Engineer Office P. O. Box 97
P. O. Box 97 Memphis, Tenn.
Memphis, Tenn.

April 23, 1932

Reply to File No.....

Subject: Tract No. 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Missouri.

Your acceptance of the offer of One thousand fifty eight and 06/100 dollars (\$1,058.06) dated Feb. 8, 1932, made by this office for a flowage easement over Tract No. 327 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Missouri, who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in the friendly condemnation suit to be filed involving this case.

Very truly yours,

BREHON, SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,
vs.
Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit I.

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Witness identified Defendant Danforth's Exhibit J, a letter dated April 25, 1932. This was offered in evidence, and is in words and figures as follows:

271 Defendant Danforth's Exhibit J.

Address Reply to War Department
District Engineer U. S. Engineer Office
U. S. Engineer Office P. O. Box 97
P. O. Box 97 Memphis, Tenn.
Memphis, Tenn.

April 25, 1932

Refer to File No.

Subject: Tract No. 187—Flowage—New Madrid Floodway.

To: Mr. Wm. Danforth,
c/o Purina Mills,
St. Louis, Missouri.

Your acceptance of the offer of One thousand nine hundred eighty and No/100 dollars (\$1,980.00) dated Jan. 14, 1932, made by this office for a flowage easement over Tract No. 187 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Missouri, who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in the friendly condemnation suit to be filed involving this case.

Very truly yours,

BREHON SOMERVELL,

Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit J.

(Signed) Paul J. Robertson

Notary Public in and for
the District of Columbia.

"Counsel for the plaintiff objected to the admission of Exhibit J, on the ground that it was immaterial.

272 • Witness identified his signature on Defendant Danforth's Exhibit K, letter dated February 11, 1932, in which he extended the time limit for the acceptance of offers to March 15, 1932. This letter was offered in evidence as Defendant's Exhibit K, and is in words and figures as follows, to-wit:



DEFENDANT DANFORTH'S EXHIBIT K.

ASSIGNED ONLY TO
DISTRICT ENGINEER
U. S. ENGINEER OFFICE
1000 MC CALL BUILDING
MEMPHIS, TENN.

WAR DEPARTMENT
U. S. ENGINEER OFFICE
1000 MC CALL BUILDING
MEMPHIS, TENN.

February 11, 1932.

REFER TO FILE NO.

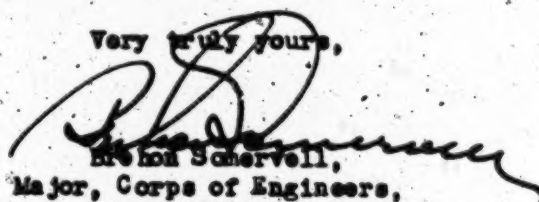
Subject: Tract 187, 243, 281, 325 and 327 - Flowage - New Madrid Floodway.

To: Mr. T. R. Roe,
c/o Ralston Purina Co., Inc.,
835 South Eighth St.,
St. Louis, Mo.

Dear Sir:

In compliance with your request, dated February 9, 1932, on behalf of Mr. Wm. H. Danforth and for the reasons stated by you, I am glad to extend the time limit for the acceptance of offers made in connection with the above tracts of the New Madrid Floodway to March 15, 1932.

Very truly yours,


Breton Schervell,
Major, Corps of Engineers,
District Engineer

c.c. to 1st Area.

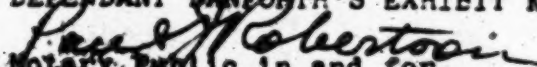
No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

v.

Beatrice McDaniel et al., defendants.

DEFENDANT DANFORTH'S EXHIBIT K.


Notary Public in and for
the District of Columbia

274 Counsel for the plaintiff made the same objections to the admission of Exhibit K as were made to Defendant Danforth's Exhibits A, B, and C.

275 Witness identified letter dated April 26, 1932, marked Defendant Danforth's Exhibit L, and stated that it had his signature on there. This was offered in evidence as Defendant Danforth's Exhibit L, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit L.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 26, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325 and 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Ralston Purina Company,
Checkerboard Square,
St. Louis, Missouri.

Dear Sir:

In reply to your letters of March 2, 12 and April 22, 1932, in regard to tracts 187, 243, 281, 325 and 327, of the New Madrid Floodway, you are referred to my letters of April 22 and 25, 1932, concerning the status of the flowage offers made in connection with these tracts.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law

Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel, et al., Defendants.

Defendant Danforth's Exhibit L.

(Signed) Paul J. Robertson
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep. 21, 1934.

Jas. J. O'Connor,
Clerk.

Counsel for the plaintiff made the same objections to the admission of Exhibit L as were made to Defendant Danforth's Exhibits A, B, and C.

276 The witness identified his signature on Defendant Danforth's Exhibit M, a letter dated November 7, 1932. This was offered in evidence as Defendant Danforth's Exhibit M, and is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit M.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

November 7, 1932.

Refer to File No.

Subject: Tracts 187, 243, 281, 325, and 327—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

Dear Sir:

I have your letter, dated November 1, 1932, requesting information as to the status of the above cases.

Suit 604 covering tract 325, was filed in January, 1932, and should come up for final settlement in the special term of Federal Court at Cape Girardeau, Mo., about January 16, 1933.

On account of the great number of suits being filed and handled in Court by the U. S. Attorney, it may be several months before it will be possible for him to file suits covering the other tracts mentioned above.

Very truly yours,

BREHON SOMERVEJ L,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel, et al., defendants.

Defendant Danforth's Exhibit M.

(Signed) Paul J. Robertson

Notary Public in and for
the District of Columbia.

(Notarial Seal)

Stamped on back of Exhibit with rubber stamp)

Filed Sep. 21 1934.

Jas. J. O'Connor, Clerk.

The witness was asked by Mr. London:

Q. Major Somervell, is it not a fact that when some of these offers were accepted, that they were paid?

A. No, sir; none of them were paid. These offers were offers to recommend a certain sum to the Court for action. The office, our office and our Department, had no authority to pay anything without the action of the Court.

Mr. London: I ask that that answer be stricken out as not responsive to the question.

Q. Is it not a fact, Major Somervell, that in many of these cases where the offers were accepted that judgments were entered up on the amounts agreed upon and were paid?

Mr. Lawrence: That is objected to as immaterial and calling for a conclusion of the witness, not evidence in this case, and not within the knowledge of the witness to testify, as to court proceedings in other cases.

A. I can not remember any individual judgments entered by the Court.

277 The witness was asked by Mr. London:

Q. Now, in this communication of November 30, 1931, marked Defendant Danforth's Exhibit A-1, it was set forth:

"The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the Court for an agreed verdict awarding the sums offered."

You knew that at the time you made these offers, did you not?

A. That is the statement by General Pillsbury; I am not sure it was correct.

Q. And he was your chief at the time? A. Yes, sir.

The originals of these offers were to have been returned to witness and he put them in a file. The records of the assessments on the tracts prior to the time he made offers were investigated by someone in the office of the witness, under the supervision of the witness. The offers that he made on the tract in question did not exceed the maximum prescribed by President Coolidge, so when the witness referred to a mistake he did not mean that there was a mistake in that respect. He was within the maximum.

The witness identified a letter dated April 15, 1932, which was marked, in the case of the United States vs. Frances-Ralph Realty Company, No. 584, Tract No. 94, as Defendant's Exhibit C, and identified his signature. This was marked Defendant's Danforth's Exhibit X, and was offered in evidence, counsel for the plaintiff objecting on the ground that it was immaterial and incompetent, and not tending to prove any issue in the case, and is in words and figures as follows, to-wit:

278 Defendant Danforth's Exhibit X.

Address reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 15, 1932.

Subject: Suit No. 584, Tract No. 94—Flowage—New Madrid Floodway.

To: Francis-Ralph Realty Co.,
c/o R. E. Neidringhaus,
933 Arcade Bldg.,
St. Louis, Mo.

Gentlemen:

Your acceptance of the offer of four thousand one hundred sixty six and 20/100 dollars (\$4,166.20), dated Jan. 8, 1932, made by this office for a flowage easement over Tract No. 94 of the New Madrid Floodway, was received March 19, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Customhouse, St. Louis, Mo., who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite

as much as possible final judgment for the above amount in the friendly condemnation suit (584) involving this tract which has already been filed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, Plaintiff,

vs.

Beatrice McDaniel, et al., Defendants.

Defendant Danforth's Exhibit X.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Defendant Danforth offered the letter dated January 8, 1932, with the typewritten signature of Brehon Somervell, concerning which the witness testified that he made the offer shown in the Exhibit because his signature is shown on Defendant Danforth's Exhibit X acknowledging an acceptance of \$4,166.20. Said exhibit is as follows:

279 Defendant Danforth's Exhibit Y.

Address Reply to	War Department
District Engineer	U. S. Engineer Office
U. S. Engineer Office	1006 McCall Building
1006 McCall Building	Memphis, Tenn.
Memphis, Tenn.	

Jan. 8, 1932.

Refer to File No.....

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

To: Francis-Ralph Realty Co.,
933 Arcade Bldg.,
St. Louis, Mo.

I. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture,

MICRO CARD

TRADE MARK 

22

39



1643

65


microcard

where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Four thousand one hundred sixty-six and 20/100 .. Dollars (\$4,166.20) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 94, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization:

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

Incls.—

Tract map;
General map of floodway;
Addressed return envelope.

Accepted:

FRANCIS-RALPH REALTY
COMPANY,

(Owner) By (Signed)
R. E. Niedringhaus,

933 Arcade Building, St. Louis, Mo.,
(Address)

March 18, 1932.
(Date)

No. 716 Law

Tracts 243 and 281

United States of America, Plaintiff,

vs.

Beatrice McDaniel, et al., Defendant.

280 Defendant Danforth's Exhibit Y.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

The witness identified his signature on a letter dated April 25, 1932, marked Defendant Danforth's Exhibit Z. This letter was offered in evidence, and is in words and figures as follows:

281 Defendant Danforth's Exhibit Z.

Address Reply to
District Engineer
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

War Department
U. S. Engineer Office
P. O. Box 97
Memphis, Tenn.

April 25, 1932.

Refer to File No.....

Subject: Suit No. 604, Tract No. 325—Flowage—New Madrid
Floodway.

To: Mr. Wm. H. Danforth,
c/o Ralston Purina Co., Inc.,
St. Louis, Mo.

Your acceptance of the offer of Three thousand sixty nine and 80/100 dollars (\$3,069.80), dated Feb. 8, 1932, made by this office for a flowage easement over Tract No. 325 of the New Madrid Floodway, was received March 3, 1932.

You are advised that the Assistant to the United States Attorney, Mr. John C. Dyott, Room 211 Custom house, St. Louis, Mo., who is handling all legal matters for the United States in connection with the New Madrid Floodway, will be informed of the status of this case and requested to expedite as much as possible final judgment for the above amount in

the friendly condemnation suit (604) involving this tract which has already been filed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

No. 716 Law
Tracts 243 and 281

United States of America, Plaintiff,
vs.
Beatrice McDaniel, et al., Defendant.
Defendant Danforth's Exhibit Z.

(Signed) PAUL J. ROBERTSON,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

Counsel for the plaintiff objected to the admission of Defendant Danforth's Exhibit Y, on the ground that it was immaterial and incompetent, and not tending to prove any issue in the case. Counsel for the plaintiff made the same objections to the admission of Defendant Danforth's Exhibit Z as were made to Defendant's Exhibits A, B, and C.

282 Witness identified his signature on letter dated February 8, 1932, marked Defendant Danforth's Exhibit AA. This letter was offered in evidence. It is not reproduced here because it is an exact copy of Defendant Danforth's Exhibit E, except that the amount is \$3,069.80, and the tract referred to is #325. It was accepted under date of March 2, 1932, by William H. Danforth, and the offer was made by Brehon Somervell in exactly the same form, and signed by Brehon Somervell, Major, Corps of Engineers, District Engineer. Counsel for the plaintiff made the same objection to the admission of this exhibit as were made to Exhibits A, B, and C.

The attention of the witness was called to an exhibit which had been marked Defendant Danforth's Exhibit A, sheets A-1 to A-5, and he was asked if that was not sent down to him in the usual course of military practice. He testified that it was civil work and the papers were forwarded to him through the usual channels used by the Engineer Department on river and harbor and flood control work. The witness testified, after objection by counsel for plaintiff, on the ground that it was immaterial and irrelevant, that he did not know whether

a failure to carry out those instructions would have subjected him to military court martial, but he testified that it would have constituted a failure to obey a military command.

Witness further testified in his 6th indorsement, on Defendant Danforth's Exhibit A-5, paragraph 2, he stated that:

"On about February 15, 1932, or 30 days after offers were made, a report as to acceptance received will be submitted."

He testified that he submitted such a report; that the report is not set out in this letter of April 4, 1932, which has been identified as Defendant Danforth's Exhibit C. He did not recall the nature of his report. His report would be a list and be carried by a letter of transmittal, which would be signed. The report would contain a statement of the status of the acceptance of the offers, that is, individual accept-
283 ances. He did not remember how many pages it contained. It was not a long report; it was a tabulation, probably, of the five hundred odd tracts. He did not know whether it was the tabulation identified as Defendant Danforth's Exhibit C, sheets C-5 to C-10. This was apparently a tabulation showing President Coolidge's maximum price, with the appraisal made by the United States Department of Agriculture, and the excess of the offer made according to President Coolidge's maximum over the appraisal, and the amount of the sum recommended to be offered.

The witness further testified that he had all the information contained in this tabulation, marked Defendant Danforth's Exhibits C-5 to C-10, inclusive, prior to the time he made this offer on Tract 243. Whenever the witness made these offers they were all typewritten and filled in with the amounts that he would offer on the particular tracts, and to that letter or offer would be attached a plat or diagram showing the plat involved.

Q. And in this procedure you did not write any additional letters to any of those land owners, telling them that you had any limited authority?

A. It is contained in the letter itself.

Q. "in the letter itself"—and that is all you ever wrote of your authority, isn't it? A. As far as I know.

Q. Take, for example, Defendant Danforth's Exhibit E, where you set out that:

"The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either

at the maximum rates authorized by order of President Coolidge, December 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned."

A. Yes, sir.

Q. You would apply the higher of the two, would you not?

A. Yes, sir.

Q. So that when you made this offer for Tract No. 284 243 of \$31,681.98, you made the higher of the two offers, that is, the two-thirds of the assessed value, as set out in the executive order of President Coolidge, or the appraisals made by the Department of Agriculture, did you not?

A. Wherever the maximum set up by President Coolidge was in excess of the appraisal of the Department of Agriculture, we fixed the figure as President Coolidge's maximum.

Q. And in this particular case you fixed the figure as the maximum as authorized by President Coolidge?

A. I think so; yes, sir.

Q. At the time when you made this offer of \$31,681.98, you knew that the figure as fixed by the Department of Agriculture was considerably less than two-thirds of the assessed value under the Coolidge proclamation, did you not?

A. Yes, sir. I also stated that:

"Payment can not be made without court action as title can not be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses."

Q. Yes, sir; and you said that an agreed verdict was to be awarded in the amount of this offer if the offer was accepted.

A. I said "requested." I could not say, very well say, "awarded." That I could not do.

Q. Yes, "request that an agreed verdict be awarded in the amount of this offer." And that statement was based upon paragraph 2. of Defendant Danforth's Exhibit A, page A-1, wherein General Pillsbury set out that:

"The status of titles in the floodway is such that the offers and acceptances are equivalent to a request to the court for an agreed verdict awarding the sums offered."

Was it not based on that?

A. It may have been.

On Cross-Examination witness testified:

285 Q. Major, making that a little more definite, what did you mean by "request of the court"?

A. We had no authority to pay any money for the acquisition of these lands without court action.

Mr. London: I object to that as calling for the conclusion of the witness and ask that the answer be stricken out as not being responsive to the question and as being the construction of the witness of a written document.

By Mr. Lawrence:

Q. And there was in contemplation all of the time that these offers were made that a further act was to be performed before the matter would be completed?

Mr. London: I object to the question, as incompetent, irrelevant and immaterial and as calling for the conclusion of the witness and calling for the construction of a written document and calling for a construction of the law.

A. Yes.

Q. You did not assume, Major, to determine the Court's judgment in the matter as to the sum of compensation to be paid?

Mr. London: The same objection.

A. No, sir. The Court at times awarded less than was agreeable to the parties.

Mr. London: I ask that that be stricken, as not responsive to the question and as having no bearing upon the case. May I ask a question at this point?

Mr. Lawrence: Yes.

By Mr. London:

Q. You say that the Court at times awarded less than was agreeable to the parties. Do you mean that upon some of these offers and acceptances the court awarded less?

A. Yes.

Q. Can you mention any case where the Court did it?

286 A. I can not mention the name of it, but, as I remember it, there was a tract down in the back water where our office thought a dollar an acre was a fair value and the Court awarded seventy-five cents.

Witness further testified that he thought it was on one of these offers and acceptances; that his offer was withdrawn prior to action by the Court. So far as he knew there was no judgment on the offers in the two cases that he made to Danforth.

By Mr. Lawrence:

Q. As the author of Defendant Danforth's Exhibit F, identified as having been transmitted by you to the defendant, will you interpret this clause:

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer."

Mr. London: I object to that as calling upon the witness to interpret the contents of the letter, calling for a construction of it, and calling for the conclusion of the witness.

A. I am not entirely familiar with the details except to this extent: if the offer was accepted we notified the special assistant to the district attorney that the price of such and such an amount was agreeable to both parties, and to request a verdict from the Court on that basis.

Mr. London: I ask that the answer be stricken out for the reasons heretofore given.

By Mr. Lawrence:

Q. I call your attention to Defendant Danforth's Exhibit N, Major. Was that in furtherance of the plan of making a request to the Court and following the request with further consideration?

287 Mr. London: I object to the question as calling for the construction of this letter and calling for the conclusion of the witness, and, furthermore, I object on the ground that it is incompetent, irrelevant, and immaterial to any issue in this case; and it was made long after the acceptance in this case.

A. This letter is apparently written by me and signed in my name, and the answer is "yes".

By Mr. Lawrence:

Q. Major, is that Exhibit N a part of the transaction in this case?

288 Mr. London: I object to that on the ground that it is leading and suggestive and not a part of the direct examination and calls for the conclusion of the witness.

A. Yes.

By Mr. Lawrence:

Q. And Exhibit N was transmitted by you in the ordinary course to the land owners to whom this so-called offer had been made?

Mr. London: The same objection.

A. Yes.

Mr. Lawrence: The paper marked Exhibit N is offered as a part of the cross-examination.

Mr. London: "Objected to as not covered by the direct examination, not relevant and not material, and not proper to be offered as part of the cross-examination.

(The paper so produced and identified and offered in evidence by the plaintiff was filed with the deposition, marked as Defendant Danforth's Exhibit N for identification, as noted at page 44 of the deposition, and also marked as the Plaintiff's Exhibit 2 Somervell.)

The exhibit is in words and figures as follows, to-wit:

Defendant Danforth's Exhibit N.

Address Reply to	War Department
District Engineer	U. S. Engineer Office
U. S. Engineer Office	P. O. Box 97
P. O. Box 97	Memphis, Tenn.
Memphis, Tenn.	

July 8, 1932.

Refer to File No.

Subject: Tracts 243 and 281—Flowage—New Madrid Floodway.

To: Mr. Wm. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

Dear Sir:

I have your letter, dated June 24, 1932, in regard to the flowage easements to be condemned by the Government over tracts 243 and 281 of the New Madrid Floodway.

It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the Court. It is not feasible for this office to recommend for an agreed verdict prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the Court, this

office is confident that just compensation will be awarded in all cases.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer.

c. c. to U. S. Attorney
c. c. to 1st Area.

No. 716 Law
Tracts 243 and 281

United States of America, plaintiff,

vs.

Beatrice McDaniel et al., defendants.

Defendant Danforth's Exhibit N for identification.

Plaintiff's Exhibit 2, Somervell.

(Signed) Paul J. Robertson,
Notary Public in and for
the District of Columbia.

(Notarial Seal)

(Stamped on back of Exhibit
with rubber stamp)

Filed Sep. 21, 1934
Jas. J. O'Connor,
Clerk.

Mr. London: I offer all the Exhibits which are attached to these depositions.

Mr. Dyott: The same objection.

The Court: Overrule the objection.

Mr. Dyott: Exception to that.

In offering the depositions and exhibits there is a stipulation with reference to the use of photostatic copies, under which it is stipulated that photostatic copies instead of originals may be used in all the depositions taken in Washington, D. C.

Mr. London: I offer all the Exhibits that are mentioned in the depositions. . . .

I offer the testimony of

ARTHUR W. SWACKER, Loan Agent for the Northwestern Mutual Life Insurance Company, with headquarters at Sikeston, Missouri. He testified that this Company had a loan on the tract in 1928 or 1927, prior to the enactment of this Floodway Act, of approximately fifty dollars per acre in there; that he had not made any loans since the Floodway went into effect in areas within the spillway, although having had applications for them; that they collected their money on this tract; that Edward G. Rollwing made the loan on it; that the land was not foreclosed; that they carried the loan on it at the time Danforth owned it; and it was still on there when he acquired it; that he paid it off; it was paid in full; that four loans, on Sections 22 and 27 were paid in full on April 26, 1925.

Mr. London: Let the record show that by consent there is no payment by the Government of any money paid into Court at this time.

Mr. Dyott: Yes, please let the record show, because there is no final judgment.

Mr. London: If the Court please, I desire to offer the Answer and Counterclaim which was filed in this case and stricken; it was filed by permission of the Court.

G. W. MILLER, Engineer, United States Engineer's Office, Memphis, Tennessee, testified that it was the practice of the Government to enter up judgments, that is, the parties appeared before the Court with the agreement to settle the flowage easement for an agreed amount; that judgments would be entered and the money would be paid.

Q. And the purpose of it was so that the title would be cleared and everybody would be agreed?

Mr. Dyott: That calls for a conclusion of the witness,
291 involving a matter of law in which the witness has not as yet been shown competent to answer.

Mr. London: If Your Honor please, it bears out what is contained in the offer that the Government made in this case, namely, that they were making this offer upon acceptance and they entered up the judgment without the hearing to show.

The Court: I sustain the objection to the question.

Mr. London: Note my exception.

Mr. London: He did testify that he entered judgments in all cases where settlements were made, for the purpose of clearing the title.

Mr. Dyott: I object to it as the witness is not shown to have testified to any such thing.

The Court: I think the offer is broad; I think probably counsel is offering to give testimony by this witness to prove something which couldn't be proved by the witness, and if counsel is going to stand on his objection, we will let the matter ride that way.

Q. I would like to ask you this question: did you receive instructions from your Legal Department to handle it that way?

A. I regulated that for myself.

Q. Do you know whether that was done prior to the time you took charge?

A. I don't think in all cases.

Q. Do you know of any case where you didn't enter judgment where settlement was made?

A. Oh, they entered judgments in all settlements, I think; the normal course of procedure since I have had charge of the cases is to present the formal agreement in the Court Room and we ask for a judgment to that amount.

Q. Why do you do that?

A. Purely to keep our records clear.

Q. What records are you talking about?

A. District records, District Office records.

Q. Was that the only purpose?

292 A. Well, the purpose might have been, too, to show they had authority to ask that judgment be taken, and bid the tract for an agreed amount.

Q. But judgments were entered up in each case, weren't they, without exception?

A. I can only speak for the—

Q. I am talking about the dates you had charge.

A. Yes, sir.

The levee was opened while Major R. D. Burdick was in charge. He is assistant to the present District Engineer at the Memphis District, in the Memphis office. His immediate superior was Colonel Reybold, stationed at Memphis. The set-back levee was completed about the latter part of 1931. The witness was not certain.

G. W. Miller further testified, on behalf of the Government, that the tract in question contained 1033.56 acres including the acreage in roads and ditch easements. The tract

comprises all of sections 22 and 27, lying east of the set-back levee. 27.7 acres or 2.8 per cent lies below elevation 300; 6.3 acres or .7 of one percent lies below elevation 299. There are no lands lower than 296 aside from ditches. Of the whole tract 995.65 acres is above backwater, that is, above 300 elevation. The highest elevation is 309.3. The lowest elevation is 296. The average elevation is 304.3.

L. T. BERTHE, a civil engineer, living at Charleston, Missouri, after testifying to his qualifications, which are admittedly adequate, but are omitted to save space, testified on behalf of defendant Danforth to his experience in the flood area, and stated that he had made a study of flood control as applied to the Mississippi and Ohio Rivers since 1914. He actually saw all of the floods from 1912, like the floods of 1912, 1913, 1916, 1922, 1927, and 1937. The present height of the riverside levee, he testified, varies somewhere from 10 to 20 feet, and in some places may be as high as 21, 22, or 23 feet. The set-back levee in one or two places had a height of 25 feet, but will vary from 10 to 20 feet, and may have some sections that are somewhat higher. He testified that the Cairo gauge is a graduated measure, such as a rule or yard stick, only it extends along the Ohio bank from the low water to the top of the concrete wall at Cairo, and is marked down there in feet and tenths, so that the surface of the water where it intercepts against the gauge gives the stage. It is located about two miles up the Ohio River from the mouth of the Ohio River. The Cairo gauge is separate from the height of the Riverside Levee. The height of it is actually the height of the river above the ground surface. Fifty-five feet on the Cairo gauge has nothing to do with the height of the Riverside Levee. It has to do with the height of the water along the Riverside Levee, or against it when the water stands at a given height on the gauge at Cairo as it passes. From an engineer's point of view, it would be possible to construct a river levee that would protect the spillway against floods if Cairo were disregarded. From time to time the Riverside Levee has been increased in height, up to the adoption of the present flood control act in 1928. The Riverside Levee started about 1903. In 1908 they were building it to a grade of 55 feet on the Cairo gauge; that meant that the top of the levee was so fixed that it would be even with the surface of the water as close as that could be determined passing Cairo at 55 feet on the Cairo gauge. Subsequent to the 1912 and 1913 floods, a new grade line was established, that is, grade lines were established by the Mississippi River Commission of the

United States Government called the 14 grade, which raised that grade line to 58 feet on the Cairo gauge. In 1926 the grade line was again raised from Cairo to Columbus, tapering out above Columbus and below Cairo to 59 feet. The actual levee construction along that Riverside Levee was built one foot above those ridges. In other words, they were built with an 8 foot crown. To that grade then an additional foot was added to what was called a bicycle crown, so that a 58 foot grade levee was built with a top adequate to 59 and a 59 foot grade with a top adequate to 60. The levee had not been raised or touched or maintained since 1927 or 1928. It was constructed, all of it with a 58 or 59 foot grade, brought to 58 and part 59 with the foot of topping in addition to that. This was also done by the United States Government under their engineers. From an engineering point of view, 295 it would be possible to construct that to 65 feet on the Cairo gauge and would be practical, so far as the territory was concerned, except for the City of Cairo. The effect of the set back levee upon water that is going to the spillway that overflows the Riverside Levee is to increase the depth, velocity, and duration of the overflow over and above what the depth, velocity, and duration of the overflow would be without the setback levee in there. If the set-back levee were not there, some of the water would pass to the west and some to the southwest. The witness had calculated the difference caused by the depth of the water by reason of the set-back levee for different floods, for the 1913 and the 1937 floods. For the 1913 flood, it increased the depth from three to four feet; for the 1937 flood, from five to six feet. The increase in depth and velocity of flow results in increased damage from wave action primarily to buildings. With ordinary high water maintenance, none of the floods would have passed over the levee between 55 and 59 feet, except the flood of 1913 and the flood of 1937. With extraordinary maintenance, such as was put on the set-back levee during the flood of 1937, none of them would have overtopped except the flood of 1937, and that would have overtopped. The witness did not think this could have been prevented by extraordinary methods. It would require ordinary high water maintenance to maintain a flood which would have exceeded $58\frac{1}{2}$ on the gauge to overtop the levee; an extraordinary high water maintenance to maintain a flood which would exceed 59. Under the project in question, the entire eleven mile Fuse Plug, with the exception of one mile in the vicinity of the Peasfield Sewer, is supposed to have water pass over it. The set-back levee would not affect the frequency with which the land would be flooded. It would produce a greater depth to the extent that its restricting ef-

feet increases the depth of overflow across the land.
296 Waters which would otherwise pass to the west are confined, and caused to pass over these lands. During the last flood, by reason of the effect of the set-back levee, in restricting and preventing the flow of flood waters to the west, there were additional flood waters diverted from the Mississippi and caused to flow over and across the land herein involved, to an increased depth of about five or six feet. Waters going through the Fuse Plug Section, which would have flowed to the west of this land, were caused to pass over this land. If you want to get the riverside levee up so that there would be a protection of 65 feet on the Cairo gauge, you would have to have three feet free board. You would have to build the riverside levee nine to ten feet higher than it is now. The lowest elevation in the land in question was practically 300. There is one point or two where it goes down to 299. The average elevation is about 304, and the highest 309. If the riverside levee were built up to a height of 65 feet, it would also be possible to fill or build up Cairo.

On Cross-Examination witness testified that the 1937 flood would have topped the riverside levee as it existed. Without high water maintenance in the Fuse Plug Section, the river would have gone over, crevassing at approximately 58 feet, slightly below. The Cairo crest of the 1937 water was 57.6, so that there was a crest there of from 12 to 18 inches above the present protection afforded by the riverside levee on the Cairo Gauge, without high water maintenance. The flood of 1937, if confined, would have reached a stage of 61½ to possibly 62 feet and would have gone over the riverside levee. It was the highest stage of recorded history since 1858 or since 1844. The 1927 flood could have
297 been controlled from overtopping riverside levee with high water maintenance. There is about 55 or 56 miles of levee between Birds Point and New Madrid around the floodway area. The 1912 flood might or might not have gone over the levees as they now exist; 1927 and 1913 would have gone over in the absence of high water maintenance. Ninety-seven percent of the entire river levee was up to fifty-eight and above, some of it to fifty-nine, and some to sixty; the low reaches were comparatively short; there would have been only a few miles that would have had to have emergency work on it; only three percent of that was below fifty-eight feet.

There are several elements that govern the depth of the water, the accumulation of water in the so-called reservoir. There is the element of a quantity of water to be passed

through, the point of origin, the character of the cross-section, whether it is clear or timber, and the head at which it enters, the direction of flow. You are governed, of course, by the quantity of water that enters the flood-way, that would be regulated, broadly speaking, by the size of the intake. The same thing would be true of the outlet, according to your location, and to make an accurate and definite statement, many elements would have to be considered, but to make a general determination they would not. Under the circumstances that existed under 1937 waters, the lower ends of the crevasses opened up. The outflow at the crest was taking care of the inflow. It was going out over and through the lower let back levee for a certain time. That flood-way always takes storage up to a maximum storage, and then waits to get return water, then the floodway largely functions as an overbank flow, so that the increased depth would depend on existing [conditions]. The 1913 flood was not restricted. The 1937 flood would have reached probably three feet higher confined stage at Cairo than the 1913 confined flood at Cairo. With the set-back levee you

298 would have had not more than three feet increased stage and depth at this location with this flood than you actually experienced in 1913, but you would instead of that have a matter of eight or nine feet. The depth would vary with each and every flood. The first crevasse Natural Crevasse No. 1 in the Riverside Levee to go into operation, although known as Nolan Crevasse, is the one below Crosno. Same is about seven miles distant from tract No. 243. Natural Crevasse No. 2 was what was known as Crosno No. 2. No. 1 went into operation about eight o'clock or slightly after on the 25th. No. 2 went into operation about the same time on the morning of the 26th. Natural Crevasse No. 3 was the next one that went into operation in the afternoon of the 26th around five o'clock. No. 4 went into operation considerably later, the witness thought the following Saturday or Sunday. No. 4 was the one that cut through from wave action on the land side. After it cut through it admitted water from the river. No. 1 went into operation prior to the artificial Crevasse occasioned by the dynamiting. It had been in operation about three hours before the Fuse Plug went into operation, so that was admitting head waters from the river into the lower part of the territory. No. 1 Artificial Crevasse is about $14\frac{1}{2}$ or 15 miles from the land of Mr. Danforth. Between artificial Crevasse No. 1 and the land in question at O'Bryan's Ridge, the water would have to build up. There was a railroad. This all had a retarding influence on the flow at the initial stages. No. 1 Natural

carried more water than No. 1 Artificial. It was a heavier load. This was true of both Naturals 1 and 2. The witness stated that he would expect the waters from Natural Crevasse No. 1 over the land before the water from Artificial Crevasse No. 1 would reach there due to the time consumed and the area taken for storage above O'Brien's Ridge, above the railroad. The Natural Crevasse admitted more water than the Artificial Crevasse. The Artificial Crevasses were all above O'Bryan's Ridge, and the Natural Crevasses 299 were all below the Fuse Plug Section along the section of the levee which local interest could have raised. Water from the Fuse Plug Section flowed over the Danforth land, but the witness was unable to state which water reached there first, the Natural overflow, or the Artificial overflow, but witness thought likely the first water would come from the Natural Crevasses.

Mr. London: I assume you will take judicial notice of the Proclamation of President Coolidge? I would like to offer that in evidence.

The Court: All right.

Said proclamation is in words and figures as follows, to-wit:

“December 11, 1928.

“Supplementing my approval of August 13, 1928, of the Board provided for in Section 1 of ‘An Act for the Control of Floods on the Mississippi River and its tributaries and for other purposes’, approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the back (westward) levee of the Birds Point-New Madrid floodway provided for in the adopted project on the west side of the Mississippi River opposite Cairo, Ill., is approved.

“Land for rights of way for this levee will be secured by condemnation as authorized by law. The purchase of flowage rights over the land within the floodway between the existing riverside levee and the back (westward) levee is authorized provided that in no case shall the purchase price for the flowage on the land above the backwater area in the southern part of the floodway be more than 66% of the present assessed valuation of this land and provided that in no cases shall the purchase price for the flowage on the land within the backwater area be more than a price ranging from 66% of the present assessed valuation of the

land at the upper limit to zero at the lower limit of the backwater area within the floodway.

"The purchase of the land within the floodway immediately adjacent to the proposed relief section of the riverside levee (about 3200 acres) is authorized provided that in no case shall the purchase price be more than twice the present assessed valuation of the land.

"The construction of the relief section proposed for the riverside levee is authorized, provided that it shall not be made until flowage rights have been secured on at least 50% of the area above backwater and 50% of the area below backwater within the floodway.

(Signed) CALVIN COOLIDGE"

300 Mr. London: I offer all the Exhibits that have been identified in this case, including the previous hearings.

Mr. Dyott: Your Honor, Counsel is suggesting that the record be clarified as to Engineering data which was submitted in the Missouri State Life case; I suggest that the record may show that all that is relative to this particular controversy may be admitted, and what is not, of course may or may not be considered by the Court.

Mr. London: Some of it wouldn't apply to the land here, because it had to do with different elevations and different tracts; but as far as applicable here, I assume you want the Engineering testimony to apply?

Mr. Dyott: Yes.

301 Mr. London: If Your Honor please, I desire to offer in evidence a certified copy of the assessment that's made on the land here in question, Section 22 and Section 27. I will just say, I offer the assessment in Sections 22 and 27, the sections here involved, the purpose being to show that the offer that was made in this case was within the two-thirds that was authorized by the President's proclamation.

The Court: You offer his assessment as of what time?

Mr. London: As of 1928, a certified copy.

Said certified copy is in words and figures as follows:

"Ward De Field
Assessor Mississippi County
Charleston, Missouri

August 21, 1934

I do hereby certify that these are the assessed valuation of 1928 assessments against said land.

W 1/2 NE	Sec. 5-23-16	\$1150.00
S 1/2	Sec. 32-24-16	4800.00
All	Sec. 22-25-16	29,250.00
All	Sec. 27-25-16	30,000.00
East 1/2 SW	" 31-25-17	3,000.00

(Signed) Ward DeField

Subscribed and sworn to before me on this the 3rd day of October A. D. 1934.

ELLIS W. HOWLETT

Clerk of the Circuit Court
Mississippi County, Missouri.

Defendant's Ex. 2
M E S 4/21/37"

G. W. MILLER Recalled, testified that construction work began upon the main set-back levee in the Birds Point-New Madrid Floodway on October 21, 1929. It was 98.9 complete on October 31, 1932. They still had a gap to close at Samos, because they did not have the right-of-way where the Missouri Pacific crosses that levee. This was in litigation, pending in the same Court.

Q. But when did you file condemnation suit for this right-of-way you say is still in litigation?

A. I would have to look that up; I couldn't tell you off hand.

Q. Was it filed along with other suits for right-of-way?

A. The record will show.

Q. Mr. Miller, as a matter of fact, after you brought suit, you didn't wait for judgment, did you?

A. Not in all cases, but we did in this.

Q. Didn't you go ahead with the set-back levee and build it?

Mr. Dyott: If the Court please, Mr. Miller has testified that he didn't come in here until after the work had started and after it was well under way.

Mr. London: I think if he knows, he can testify. The Court might take judicial notice of the fact that they went ahead with the set-back levee and didn't pay any attention to judgments.

Mr. Dyott: I am willing that the record may show, if it will, whereby counsel may know, that the Government took Orders of Possession on all set back levee right-of-ways except where the railroad crossed at Samos, and likewise the diversion ditch. As the suits were filed, Orders of Possession were granted by the Court and they were taken over by the Government and then later worked out to a judgment.

The Court: Does that satisfy you?

Q. Let me see if I understand you correctly: you are now testifying that ninety-eight and nine-tenths per cent. was completed October 31, 1932, and no work has been done since that date, is that right?

A. There has been work done on it, because slides developed on the set-back levee and we replaced them.

303 Q. I don't mean that; I mean the one and one-tenth per cent. of work not completed.

A. I don't know exactly what the one and one-tenth per cent. covers, but in that percentage is the closing at Samos. This is the best information that I have available, Mr. London, here; I am giving you all I have.

Q. Mr. Miller; as an Engineer, do you consider this all one project, I mean the spillway and set-back levee, one proposition or one project?

Mr. Dyott: I object to that question; it is not the subject of expert opinion; it is a matter of law.

The Court: Sustain the objection.

Mr. London: Note my exception.

To which action and ruling of the Court, defendant, Danforth, by counsel, then and there duly excepted and still continues to except.

COLONEL EUGENE REYBOLD, testified he was a Lieutenant Colonel, Corps of Engineers, United States Army, stationed at Memphis, Tennessee. He had charge of what is known as the Memphis Engineers District 1, extending from Cape Girardeau along the main stream to the mouth of the Arkansas River, and West along the White, St. Francois and Arkansas Valleys throughout, with all their tributaries. This included the Birds Point-New Madrid extension. He was

familiar with the floodway project as it applied to that area and had been over the same and had been in charge of the same since May of 1935. His predecessor was Major W. H. Hoge. Major R. D. Burdick was the Military Assistant of witness, and in the absence of the witness was in charge. He was in the area in question during the recent flood in January, 1937. He was on a tour of inspection just about 304 the crest or a little bit after the crest. That was after the water topped the levee. Major Burdick was sent by the witness on January 24th, Sunday, from Memphis, to assume charge of what they call the Cairo sector.

Q. Did you issue any instructions in connection with the dynamiting of that levee?

A. I issued instructions to Major Burdick when I sent him from Memphis on January the 24th, that he should open the floodway.

Mr. Dyott: That question calls for a "Yes" or "No" answer, and before he gets into that enquiry I desire to get an objection into the record, Your Honor. I move to strike that out as not responsive, and the Colonel may answer that by "Yes" or "No."

The Court: Sustain the motion.

A. Yes.

Q. What were those instructions?

Mr. Dyott: If the Court please, the Government desires at this time to interpose an objection to the enquiry by counsel, in addition to the objection interposed as of yesterday in this record, and with the Court's permission I would like to read it into the record here; I have taken some time to prepare it and I would like to read it into the record. The Government contends, in this connection, that the Flood Control Act is definite and specific and that the record now is so that the Government interposes an objection to any enquiry and the testimony on the part of any witness, seeking to show or showing the artificial crevassing by dynamite, or otherwise, of any portion of the river-side levee relating to the Birds Point-New Madrid Floodway project, for the reason that, in the first instance, the Flood Control Act of May 15, 1928, provides that the area within the confines of the river-side levee shall have protection until the entire floodway project is completed, and any artificial crevassing of any 305 portion of said river-side levee prior to the completion of said levee, by any Government employee, would

be an act without the authority and against the mandate of Congress as declared in that Act; that the Act of May 15, 1928, further imposes the limitation of fifty-five feet on the Cairo Gauge as the maximum at which the river-side levee may be minimized under the Act and any minimization below said fifty-five feet on the Cairo Gauge by any Government employee, regardless of who the official may be and irrespective of the manner in which the same may be accomplished, would be an act without the authority of and in excess of and against the planned mandate of Congress; that it is a matter of Court record that the Birds Point-New Madrid Floodway project has not yet been completed because all flowage easements have not yet been acquired, nor have all records specified in the plan of the project on file in this Court been completed; that the completion of the acquisition of flowage easements and the acquisition of other necessary titles is a condition precedent to any minimization of the river-side levee to fifty-five feet specified in the plan on file in this Court and authorized by the Act, and until the acquisition of said titles has been completed and all of the flowage easements are acquired, the fuse-plug specified in the plan on file in this Court and with reference to which this proceeding is bound part and parcel may be created by the minimization of the river-side levee only to the extent specified in said plan; that because of the premises the Government is not bound in this proceeding and under the Flood Control Act of May 15, 1928, by the result of any act consisting of crevasing, by dynamite or otherwise, any portion of the river-side levee thereafter having reference to the Birds Point-New Madrid Floodway, and any act of any employee, agent or representative of the Government that is without the authority of said Act of Congress cannot in any wise be charged against the Government for the purpose of showing or

306 claiming damages in this proceeding which by the Petition filed herein specifically describes the taking all conditions surrounding same and the title desired to be acquired; that any artificial crevasing by dynamite or otherwise of any portion of the river-side levee by any Government employee, regardless of whom he may be, would be in the nature of a tort on the part of the individual doing it; that this is a condemnation proceeding instituted to determine the damages, if any, to the owners of the land herein on account of the proposed taking described in Plaintiff's Petition filed in this cause and under the authority of and pursuant to the provisions of the Flood Control Act of May 15, 1928; that a limited title in the land described in this proceeding is sought; that all conditions surrounding the acquisition of the

title desired to be acquired are specifically set forth in Plaintiff's Petition and neither the kind nor extent of title sought to be acquired under the plan on file in this Court relating to this proceeding exceeds the limits of authority provided by Congress in said Act because the easement desired to be acquired has reference to a minimization of the river-side levee according to the plan on file, and that is the reduction to fifty-five feet on the Cairo Gauge imposed by Congress. Now, just a further addition to that, Your Honor: what we mean in our position is just this: this is a suit in condemnation; the plan has to be followed; it is an adopted plan; those specified are all on file here. If the people in that section desired to maintain that levee at fifty-five feet under the plan and under the mandate of the Flood Control Act, that was one thing; now, in response to a matter of emergency where life and death and property may be involved, that is entirely another thing and should be established by a separate and independent action; and what counsel is seeking to do by bringing this in is to show acts which were not for the sole purpose of the completion of this project; that wasn't 307 the purpose of it; the purpose of it was to relieve, to save life, the same as if a town was burning and it was necessary to go in and tear down half of the center of the town in order to stop the burning. There are two separate and distinct causes, and I submit that the showing of any act by any individual employee of the Corps of Engineers, or by any civilian or anyone in connection with that would be treated as an overt act and independent of the cause on trial, and evidence of that act is not relevant and cannot be accepted.

The Court: Overrule the objection.

Mr. Dyott: Exception.

A. My instructions to Major Burdick were to the effect that he was authorized and directed to place the Birds Point-New Madrid Floodway in operation.

Mr. Dyott: May the record show, Your Honor, that my objection applies now to each and every question without repeating it?

The Court: The record may so show.

Mr. Dyott: The exceptions as well?

The Court: Yes.

Q. Colonel, how many days was that before the fuse-plug was cut and dynamited?

A. I believe it was dynamited the next day.

Q. Did you get any instructions from any of your superiors to that effect?

A. No, sir.

The witness was not present at the time the levee was cut or dynamited. He recalled no telephone conference with Burdick about it. He did not personally issue instructions with reference to sending out notices or warnings to the inhabitants of this floodway area, but believed it was done just prior to the return of the witness from a trip out West. He only knew through hearsay what method was used. Witness was immediately in charge of the restoration of the

Riverside Levee. He had received instructions with

308 reference to the restoration of the riverside levee, and

they were proceeding with contracts down there. He

issued those instructions to his general office force. He had

at one time received instructions from the Chief of Engineers

that the levee was to be restored only to fifty-five feet. These

instructions were issued from the office of General Edward

M. Markham, and came through military channels in the

regular and usual way. These orders were issued to the

witness personally as the officer in charge of the Memphis

area, and came to the District Engineer. These orders were

in writing and the witness had those orders in Memphis.

Then in turn the witness issued instructions to his office force

that the riverside levee was only to be restored to the height

of fifty-five feet on the Cairo Gauge. That subsequently was

countermanded, and since then the witness issued instructions

to restore it to the existing grade and section.

Q. Did you take the matter up with anybody when you received orders to restore it only to fifty-five feet?

Mr. Dyott: If the Court please, I submit that the enquiry that counsel has indulged in has elicited all of the material and relevant matter that's necessary in the case; I object to any further enquiry in that connection as immaterial.

Mr. London: The purpose of it is to show the influence of the Army Engineers; they don't feel bound by anything. If they get an idea they can change it; all they have to do is change it.

Mr. Dyott: I submit it is entirely immaterial, and I object to it.

The Court: Sustain the objection.

Mr. London: Note my exception.

MAJOR R. D. BURDICK, testified that he was a Major in the Corps of Engineers, United States Army, stationed at Memphis, Tennessee, and had been there two years on June 10, 1937. He was Military Assistant to Colonel Reybold, the District Engineer. His training as engineer consisted of graduation from Cornell with, a degree of Civil Engineer, 1914. He had been connected with the Army nearly twenty-one years. He is in the military service of the Army. He came to the floodway area January 24, 1937. He was sent there by Colonel Reybold. He was authorized and directed to open the fuse-plug section of the levee, thus placing the Birds Point-New Madrid Floodway into operation.

Q. Just what did you do, did you have occasion to open this fuse-plug section?

Mr. Dyott: Well, now, if the Court please, in his enquiry as to the actual set of crevassing the levee, I desire that the objection heretofore made apply to the testimony of this witness, to each and every question relative thereto.

The Court: It may so apply.

Mr. Dyott: And save our exceptions accordingly.

The witness arrived at Cairo, Illinois, on January 24th; that is, not inside the area known as the floodway; he went to the floodway area on January 25th, about 7:00 A. M. About forty or fifty government employees went with him. With one exception, these employees were not in the army. The employees under the charge of witness proceeded to place dynamite in the levee and explode it.

Q. When you arrived there, the water wasn't going over the levee at the time, was it?

A. There was a small trickle of water over the levee.

Q. Had you cut any of the levee before you dynamited it?

A. No, sir, we had not.

Q. Did you have any trench cut right in back of it?

A. There were three small trenches across when I arrived.

He did not know who dug those except from hearsay. The levee was dynamited, and the first shot went off at eleven-twelve A. M., January 25th. A portion of the levee itself, about sixty feet long, was dynamited. The witness did not know the depth, did not measure it. One place was dynamited at eleven-twelve. The next shot was fired about an hour later, approximately two or three hundred feet. There were two places dynamited at that particular place. They dynamited two more holes at another position on that

same date, during the afternoon. The last shot went off about 5:30 P. M.

Upon being asked to describe the places where the shots were fired, the witness stated the first one was at what they know as Levee Mile Post 34, that is, the first two openings; the second one at Levee Mile Post 38. These locations are approximately within a few hundred feet. He did not order any sacks removed before the dynamiting. These crevasses that were created by these shots or explosions were approximately the same in size, in the neighborhood of about sixty feet long. The witness could not give the depth. The witness issued instructions that notice or warning be given to the inhabitants of this floodway area. He issued that notice January 20th. He did not know whether the notice was sent out. The notice was a typewritten warning to the residents of the floodway that the floodway would probably be flooded within the next week.

On Cross-Examination witness testified that the warnings which were put out did not indicate or did not particularly specify that the floodway would come into use; simply that it would come into use.

This was all the evidence offered in the case.

And thereupon the case was submitted, and by the Court taken under advisement.

And thereafter, and on to-wit: the 23rd day of April, 1937, the Court handed down its decision in words and figures [—]

311

(Decision.)

In the United States District Court for the Southeastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff,

Suit 716 vs.

Beatrice McDaniel, et al., Defendants.

Tract 243.

Tract 243—1033.56 acres.

Award of First Commission, \$20,409.90, heretofore set aside on exceptions of plaintiff as excessive.

Award of Second Commission \$8,428.25, heretofore set aside on exceptions of defendant, William H. Danforth, as inadequate.

Award of Third Commission, \$17,921.70, to which both plaintiff and defendant, William H. Danforth, have filed and submitted exceptions.

Exceptions of both plaintiff and defendant, William H. Danforth, to the report and award of the Third Commission are overruled.

United States District Judge.

Report of Commissioners approved and confirmed; judgment of condemnation awarded plaintiff as prayed; damages of defendant fixed at the amount set out in Report of Commissioners and judgment entered accordingly in the above case this day.

J. J. O'C.

April 23, 1937.

And on said day the following judgment was entered:
312 as follows, to-wit:

Findings and Judgment.

"In the United States District Court, Eastern District of Missouri, Southeastern Division.

United States of America, Plaintiff,
Case No. 716 vs.
Beatrice McDaniel, et al., Defendant.

-(Tract No. 243.)

Now on this, the 23rd day of April, 1937, having considered the evidence submitted by both plaintiff and defendants in the above numbered cause as to Tract No. 243, being a portion of the real estate described in said petition, and being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, the Court doth find and adjudge and decree in the manner following, to-wit:

The Court finds that the United States of America is plaintiff and that the following are defendants:

Beatrice McDaniel, Poplar Bluff, Missouri;

William H. Danforth, St. Louis, Missouri;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, and given to secure the sum of \$16,000.00;

313 Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

Wilbur E. Hoag, as trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 22, 1920 in book 69 at page 126 of the records of Mississippi County, Missouri, and given to secure the sum of \$15,000.00;

Northwestern Mutual Life Insurance Company, a corporation, as cestui que trust in the above mentioned deed of trust;

.

The Court doth further find that this proceeding was instituted by the plaintiff in the way and manner as is by statute, in such cases, made and provided; that said petition sets forth a complete cause of action which has for its purpose, the ac-

quirement by proceedings in condemnation of a perpetual easement over, upon and across the lands described in said petition, and which said easement is acquired for the use and benefit of said plaintiff in the establishment of a floodway, as defined and described in said petition, and in furtherance of, and in compliance with; and in conformity to the act of Congress of May 15, 1928, Chapter 569, entitled "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other purposes", and which is designated and known as the "Flood Control Act".

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided;

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with all necessary writs and notices required by law, and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

314 The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the use and purpose set forth in said petition; and that the said Court did in accordance with said notice, upon the 7th day of February, 1934, appoint three viewers, to-wit:—E. P. Deal, R. L. Shelby and E. C. Davis to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned to them by the Court, and the law in such case made and provided, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 4th day of May, 1934, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by

law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report; that the amount awarded by said viewers in their report filed on May 4, 1934, as to said Tract No. 243 was \$20,409.90; that exceptions to said viewers' award as to said Tract No. 243 were duly filed both by the plaintiff herein and by the defendant William H. Danforth; that on October 23, 1935, upon due notice to all parties, said cause came on to be heard upon the said exceptions, and that upon the evidence presented by both plaintiff and defendants, the Court did sustain the exceptions of the plaintiff and did overrule the exceptions of the defendant.

315 William H. Danforth, and vacate and set aside the said award of viewers as contained in their report filed on May 4, 1934, all as set out in the order of the Court filed and entered on January 28, 1936; that on April 10, 1936, the Court referred the matter of the assessment of damages as to said Tract No. 243 to a new board of viewers, to-wit: Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 29th day of May, 1936, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on May 29, 1936, was \$8428.25;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

That the defendant William H. Danforth did on the 5th day of August, 1936, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on May 29, 1936, as to the amount assessed therein for damages to said Tract No. 243; that no exceptions to said viewers' report were filed by the plaintiff herein, nor by any other of the defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

The Court further finds that on the 23rd day of October, 1936, upon due notice to all parties, said cause came on to be heard upon the said exceptions of the defendant William H. Danforth, and that upon the evidence presented by both plaintiff and defendant, the Court did sus-

tain the exceptions of the defendant, and did vacate and set aside the said award of viewers as contained in their report filed on May 29, 1936, all as set out in the order of the Court filed and entered on October 24, 1936; that on November 28, 1936, the Court re-referred the matter of the assessment of damages as to said Tract No. 243 to the same board of viewers, to-wit, Messrs. Stephen Barton, J. E. Schmuke and J. H. King;

The Court finds that the said viewers before entering upon their duties as such, did take and subscribe to the required oath; that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 11th day of March, 1937, and in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form; that the amount awarded by said viewers in their report filed on March 11, 1937, was \$17,921.70;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of said viewers' report;

That the plaintiff did on the 30th day of March, 1937, and within the time and in the way and manner prescribed by law, duly except to the report of said viewers filed on March 11, 1937, as to the amount assessed therein for damages to said Tract No. 243, and that the said William H. Danforth filed his exceptions to said viewers' report on March 20, 1937; that no exceptions to said viewers' report were filed by any of the other defendants, and said persons so failing to file exceptions are hereafter barred from so doing, or voicing any objections to said viewers' report;

317 The Court further finds that on the 21st day of April, 1937, upon due notice to all parties, said cause came on to be heard upon the exceptions of plaintiff and defendant William H. Danforth; that all the issues and matters in connection with said Tract No. 243 were submitted to the Court, and that upon evidence submitted by both plaintiff and defendants, the Court did overrule the said exceptions of the plaintiffs, and of the defendant William H. Danforth, and did confirm the said viewers' report as to said Tract No. 243; that the plaintiff is entitled to a judgment in condemnation of said land and the defendants herein having any right, title or interest in and to said Tract No. 243 are entitled, in solido, to damages in the sum of \$17,921.70, the said sum

being the full amount to which said defendants named in said petition as claiming an interest in and to said tract, and any and all other persons who may be found entitled thereto, are entitled for the purposes for which said action in condemnation was brought, and being the same amount of damages as found by said viewers in their report filed as aforesaid, on March 11, 1937;

The Court finds that the premises described in this petition as Tract No. 243, over which the plaintiff seeks to condemn the said easement and which said premises were viewed by said commissioners or viewers, and which are included in the report thereof, are bounded, defined and described as follows: Tract No. 243, being:

243 Floodway.

Description.

A tract of land lying wholly within Sections 22 and 27, T. 25 N., R. 16 E., of the 5th Principal Meridian, Mississippi County, Missouri, as shown on the plat, and being more particularly described as follows:

The east half of the said section 22, and the east half of the said section 27, containing 640 acres, more or less;

The part of the west half of the said section 22, and the part of the west half of the said section 27; lying southeast of the Birds Point-New Madrid Floodway levee right of way, and being more particularly described as follows: Beginning at a point "A", the said point "A" being the southeast corner of the southwest quarter of the said section 27; thence along the south line of the said southwest quarter of the said section 27, South 89° 29' West, 2142.5 feet to point "B", the said point "B" being on the southeast boundary line of the said Floodway levee right of way; thence along the said boundary line, North 0° 30' East, 714.7 feet to point "C"; thence along the said boundary line, North 89° 30' West, 65.0 feet to point "D"; thence along the said boundary line, North 0° 30' East, 1806.5 feet to point "E"; thence along the said boundary line, North 89° 37-1/2' West, 20.0 feet to point "F"; thence along the said boundary line, North 0° 15' East, 2262.7 feet to point "G"; thence along the said boundary line, North 20° 02' East, 446.7 feet to point "H", the said point "H" being on the south line of the said west half of the said section 22, and being North 89° 27' East, 562.0 feet from the southwest corner of the said section 22; thence along the said boundary line, North 20° 02' East, 686.0 feet to point "I"; thence along the said boundary line, South 69° 58' East, 145.0 feet to point "J"; thence along the said

boundary line, North 20° 02' East, 1162.7 feet to point "K"; thence along the said boundary line, North 11° 59' East, 3636.5 feet to point "L", the said point "L" being on the north line of the said west half of the said section 22; thence along the said north line of the west half of the said section 22, South 89° 43-1/2' East, 490.4 feet to point "M", the said point "M" being the northeast corner of the said west half of the said section 22; thence along the east line of the said west half of the said section 22, South 0° 09' East, 5250.0 feet to point "N", the said point "N" being the northeast corner of the said west half of the said section 27; thence along the east line of the said west half of the said section 27, South 0° 09' East, 5176.9 feet, more or less, to the point of beginning; the said part of the said west half of the said section 22, and the said part of the said west half of the said section 27, containing 393.56 acres, more or less.

There is excepted a ditch easement for right of way of Lat. #2 of D. D. #23 over 19.85 acres, more or less, and also a County road easement for right of way over 11.02 acres, more or less; the said tract containing 1033.56 acres, more or less.

The bearings of boundaries in this description are referred to true North.

The Court doth further find that the easement which plaintiff seeks over and across the above described premises is in completion of the project provided for, and in compliance with, the Act of Congress of May 15, 1928, Chapter 569;

Now Therefore, it is ordered, adjudged and decreed that the said exceptions to the report of the viewers as to said Tract No. 243 should be, and the same are hereby overruled; that the said award of commissioners as to said Tract No. 243 should be, and the same is hereby confirmed and the sum of \$17,921.70 is awarded, in solido, to the defendants 319. named in said petition as claiming an interest in and to said land and to any and all other persons who may be found entitled thereto; that the plaintiff-condemnor, to-wit, the United States of America, by virtue of this proceeding shall have judgment in condemnation against the premises described in said petition, and for the purposes therein defined, and against the defendants therein and each and all of them, jointly and severally as their rights may appear; and that the said plaintiff shall acquire the full, complete and perpetual easement over and across said lands, and the power, right and privilege to cause said lands hereinbefore described to be used for the purpose of a floodway as contemplated by the Act of Congress of May 15, 1928, Chapter 569, and as more fully described in House Document 90 which is made

a part of said Act, and that such right shall forever vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, claim, title or interest, of any name, nature or description, that shall in any wise conflict with or interfere with the right of said plaintiff to establish and maintain the aforesaid floodway, and such right shall be vested in the United States of America forever; and

It Is Further Ordered that the plaintiff herein shall pay into the registry of this court the sum of \$17,921.70, in solido, which shall be held for the use and benefit of the defendants named in said petition as claiming an interest in and to said Tract No. 243, and any and all other persons who may be found entitled thereto, in the way and manner and in proportion as this Court shall hereafter order, adjudge and decree; and that upon the payment of the said sum, the plaintiff shall be entitled to the relief prayed for in said petition, and as prayed.

CHARLES B. DAVIS,
United States District Judge.

Dated this, the 23rd day of April, 1937.

320 And thereafter, on the 27th day of April, 1937, plaintiff filed its motion for new trial as to Tract #243.

And thereafter on the 14th day of July, 1937, defendant, Danforth, filed its motion for new trial as to Tract #243.

In order to avoid repetition in the record the following stipulation was entered into:

(Stipulation that Motions for New Trial may be considered as part of Bill of Exceptions, etc.)

In The District Court of The United States Within and for the Southeastern Division of The Eastern Judicial District of Missouri.

United States of America, Plaintiff;

vs.

Beatrice McDaniel, et al., Defendants.

Cause No. 716. Tract No. 243.

It is hereby stipulated by and between the parties to the above entitled cause, through their respective counsel, that the motions for new trial filed by the plaintiff and defendant need not be rewritten here but may be considered as part of this bill of exceptions by reference to the motions for new

trial of both plaintiff and defendant, which are called for by the praecipe and are set out in the record.

JOHN WEBER, Special Attorney,
Department of Justice.
Attorney for Plaintiff.

LEAHY, WALTHER, HECKER & ELY
& J. L. LONDON,
Attorneys for Defendant, William
H. Danforth.

321 And thereafter the said separate motions of plaintiff and defendant Danforth for new trial as to tract #243 were argued and submitted by plaintiff and taken as submitted by defendant Danforth.

And thereafter, and on to-wit: the 30th day of November, 1937, the motion for new trial of plaintiff was overruled, to which action of the Court plaintiff duly excepted.

And thereafter, and on to-wit: the 30th day of November, 1937, the motion for new trial of defendant, William H. Danforth, as to Tract #243 was overruled, to which action of the Court the said defendant, William H. Danforth, duly excepted.

(Approval of Bill of Exceptions by District Judge and Counsel.)

Forasmuch, as said matters do not appear of record herein, the defendant, William H. Danforth, has prepared and now presents this, his Bill of Exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 1 day of June, 1938.

CHARLES B. DAVIS,
Judge, Southeastern Division, Eastern
Judicial District of Missouri.

Approved:

HARRY C. BLANTON, U. S. Atty.
L. JOHN WEBER, Special Atty. Dept. of
Justice.

Attorneys for Plaintiff.

LEAHY, WALTHER, HECKER &
ELY, & J. L. LONDON,
Attorneys for Defendant, William
H. Danforth.

Endorsed: Filed June 1-1938, Jas. J. O'Connor, Clerk.

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Praecepta for Transcript.)

(Filed April 11, 1938.)

The Clerk of the District Court is requested to prepare for transcript to the United States Circuit Court of Appeals for the Eighth Circuit the portions of the record of this cause, as follows:

1. Petition, Cause 716, Tract 243, omitting caption, but inserting the following paragraphs: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, (omitting 10-a and 10-b), inserting 10-Z (35), 10-Z (36), tract #243, including the description of tract #243, including the description of tract #243, 10-Z (38), 10-Z (39), 10-Z (40), 10-Z (41), 10-Z (42), last paragraph in petition before prayer "that the plaintiff, etc." and ending "to be acquired by these proceedings." Prayer of petition. Affidavit.
2. Interlocutory order appointing commissioners, February 7, 1934.
3. Report of commissioners of May 4, 1934.
4. Exceptions to commissioner's report filed by plaintiff May 9, 1934.
5. Exceptions of Danforth to commissioner's report of \$20,409.90 filed June 4, 1934.
6. Order authorizing defendant, William H. Danforth, to file answer and cross-bill or other pleading, filed July 5, 1934.
7. Application for dedimus to take depositions, filed August 25, 1934, including affidavit of J. L. London, attorney. Order directing issuance of same, and dedimus issued.
8. Stipulation dated August 30, 1934, signed the 6th day of September, 1934, by Harry H. Blair for plaintiff and J. L. London for defendant.
- 323 9. Answer and counterclaim of William H. Danforth filed September 10, 1934.
10. Motion to strike answer and counterclaim, filed by plaintiff October 8, 1934.
11. Motion to amend exceptions, filed October 12, 1934.
12. Notice filed October 12, 1934, of motion to be filed to amend exceptions filed on or about June 4, 1934.
13. Memorandum of Court dated October 12, 1934, as corrected, in connection with the motion of defendant Danforth to amend exceptions.

14. Order and Memorandum of Court sustaining motion to strike answer and counterclaim argued on October 15, 1934, before Honorable C. B. Faris and exception noted by defendant.

15. Motion of defendant, William H. Danforth, to vacate award of viewers, to set aside findings of fact, interlocutory decree, and of appointment of viewers, and for judgment, as amended, under date of October 26, 1934, filed October 18, 1934.

16. Term bill of exceptions of defendant, William H. Danforth, as to Tract #243 filed October 22, 1934.

17. Term bill of exceptions filed October 22, 1934, in connection with the ruling of the Court on the motion of William H. Danforth to amend exceptions, the Court overruling the motion under date of October 12, 1934, as to amending that part of the exceptions filed, by adding after the word "award" in line 5, on page 2, the quotation set forth in the motion to amend.

18. Motion to modify by interlineation filed October 26, 1934.

19. Order of October 26, 1934, granting defendant Danforth leave to amend his motion filed October 18, 1934, to vacate award of commissioners as to tract #243 by interlineation.

20. Order and Memorandum of Judge Davis filed October 21, 1935, reading as follows:

"Motion of William H. Danforth to vacate the award of viewers to set aside findings of fact, interlocutory decree, the appointment of viewers and for judgment on Tract #243 and #281 overruled for the reason: That the subject matter of said motion should have been presented by answer and that Present motion has been untimely filed and presented.

Exceptions noted by defendant. Charles B. Davis,
Judge.

324 21. Stipulation dated October 26, 1935, with reference to correction so that #281 may be marked to read #243 on the Memorandum filed under date of October 12, 1934.

22. Term bill of exceptions on the motion of defendant, Danforth, to vacate the award of viewers, setting aside find-

ings of fact, interlocutory decree, and for judgment, argued, submitted, and ruled on on October 21, 1935.

23. Term bill of exceptions filed by William H. Danforth March 30, 1936, as to Tracts #243 and #281.

24. Order of January 28, 1936, sustaining plaintiff's exceptions.

25. Order of April 10, 1936, appointing viewers.

26. Exceptions of Danforth of April 10, 1936, to order appointing viewers.

27. Report of commissioners filed May 29, 1936. (\$8428.25)

28. Motion of William H. Danforth renewing motion filed on April 8, 1935, and overruled October 21, 1935, to vacate award of viewers, set aside the findings of fact and interlocutory decree and appointment of viewers and for judgment in the sum of \$31,681.98, Filed August 5, 1936, as to Tract #243.

29. Exceptions of August 5, 1936, of William H. Danforth to report of commissioners.

30. Term bill of exceptions following motion filed August 5, 1936, to vacate award of viewers, etc.

31. Motion of defendant for judgment filed October 23, 1936.

32. Order of October 23, 1936, overruling motion for judgment.

33. Order of October 24, 1936, sustaining defendant's exceptions.

34. Order appointing commissioners to Tract #243 on November 28, 1936.

35. Term bill of exceptions filed November 30, 1936.

36. Commissioner's report filed March 11, 1937, awarding \$17,921.70.

37. Exceptions of plaintiff filed March 30, 1937, to viewers' report filed March 11, 1937.

38. Exceptions of defendant, William H. Danforth, filed March 30, 1937, to the report of the viewers, Stephen Barton, J. H. King, and J. E. Schmucke, which report was filed March 11, 1937.

39. Findings and judgment filed April 23, 1937, entering up judgment in favor of plaintiff and for the easement and

in favor of defendant in the sum of \$17,921.70, dated April 23, 1937. Memo filed.

325 40. Order filed April 23, 1937, overruling exceptions of both plaintiff and defendant, and exceptions saved by defendant, Danforth.

41. Plaintiff's motion for new trial as to Tract #243, filed April 27, 1937.

42. Defendant's motion for new trial as to Tract #243, filed July 14, 1937.

43. Disclaimer of Northwestern Mutual Life Insurance Company and petition for dismissal of proceedings as to said corporation and Wilbur E. Hoag, and order of dismissal, filed October 19, 1937.

44. Orders overruling motions for new trial of plaintiff and defendant of November 30, 1937.

45. Exceptions of plaintiff and defendant to orders overruling motions for new trial.

46. Petition for appeal.

47. Bond on appeal and approval thereof.

48. Assignment of Errors.

49. Citation and acknowledgment of service.

50. Order allowing appeal.

51. Order extending time thirty days for filing bill of exceptions.

52. Order extending time for filing transcript.

53. Order extending time twenty days for filing praecipe.

54. Order extending time fifteen days additional for filing praecipe. Order dated March 15, 1938.

55. Order of March 22, 1938, extending time for filing bill of exceptions to April 27, 1938, and extending time for filing transcript until and including May 7, 1938.

56. Order extending time for filing praecipe fifteen days additional from and after March 30, 1938, order being made March 30, 1938.

57. Praecipe for transcript.

58. Bill of exceptions, including abstract of depositions of Edward M. Markham, Patrick J. Hurley, and Major Somervell, and exhibits.

59. Record entry of approval and filing of Bill of exceptions.
 326 60. Clerk's certificate.

LEAHY, WALTHER, HECKER & ELY & J. L. LONDON
 Attorneys for Defendant,
 William H. Danforth.

Copy received this 7th day of April, 1938.

L. JOHN WEBER,
 Special Attorney, Department
 of Justice

JOHN C. DYOTT
 Attorney for Plaintiff.

Enclosed: Filed Apr. 11, 1938. Jas. J. O'Connor, Clerk.

327 (Clerk's Certificate to Transcript.)

United States of America,
 Southeastern Division of the
 Eastern Judicial District Missouri:—ss.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern Judicial District of Missouri, Southeastern Division thereof, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and files in cause No. 716, of United States of America, Plaintiff, vs. Beatrice McDaniel, William H. Danforth, Wilbur E. Hoag, as Trustee, etc., et al., are defendants, in the matter of the appeal of William H. Danforth, save as restricted by praecipe for transcript hereinbefore set forth, and as noted therein, and such matters as appear since the filing of the praecipe, as the same remains on file and of record in said cause in my office; and that the original citation is hereto attached and herewith returned.

(Seal of the
 U. S. Dist. Court,
 S. E. Div. of the
 Eastern Judicial
 Dist. of Missouri)

In Witness Whereof, I have hereunto set
 my hand and affixed the seal of
 said Court at office in Cape Girardeau, Missouri, this 28th day of
 June 1938.

JAS. J. O'CONNOR,
 By James M. Arnold,
 Deputy Clerk.

Filed Jul 15, 1938. E. E. Koch, Clerk.

[fol. 217] Ruling of the Court on Exceptions To Awards.

In the United States District Court For the Southeastern,
Division of the Eastern Judicial District of Missouri.

United States of America,
No. 716. vs. Tracts 243 and 281.
McDaniel, et al.

Tract 243 contains 1033.56 acres, and the award of the Commissioners was the sum of \$20,409.90.

This is a high, well developed tract of land, about 887 acres cleared and in cultivation, about 108 acres in woodland, and about 37 acres in ditches and ponds. It cannot be said that the average per acre award is excessive, so far as the land in cultivation is concerned. But as to woodland, ditches and ponds, this average is too high.

Plaintiff's exceptions to the aggregate award of the Commissioners are sustained for the reason that said award is excessive.

CHARLES B. DAVIS,
U. S. District Judge.

Endorsed: Filed Jan. 28, 1936. Jas. J. O'Connor, Clerk.

**[fol. 218] (Order For Certification of Ruling on Exceptions
to Awards to Appellate Court.)**

In the United States District Court For the Southeastern
Division of the Eastern Judicial District of Missouri.

United States of America,
No. 716. vs.
Beatrice McDaniel, et al.

Now on the 13th day of October, 1938, on oral motion and request of J. L. London, Esq., counsel for defendant, W. H. Danforth, the Clerk of this Court is hereby directed to certify to the United States Circuit Court of Appeals for the Eighth Judicial Circuit a true and correct copy of the Ruling of Hon. Charles B. Davis, United States District Judge as to tract No. 243, filed January 28, 1936.

GEO. H. MOORE,
U. S. District Judge.

[fol. 219] (Certificate of Clerk to Rulings on Exceptions to Awards, etc.)

United States of America,
Eastern District of Missouri,
Southeastern Division.—ss.:

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Ruling of the Court on Exceptions to Award as to tract No. 243, in the cause of United States of America vs. McDaniel, et al., No. 716, filed January 28, 1936, together with a copy of the order of Hon. Geo. H. Moore, Judge of said Court directing the Clerk of this Court to certify to the United States Circuit Court of Appeals a copy of the Ruling of Hon. Charles B. Davis, Judge, as to said tract as filed January 28, 1936, now remaining among the records of the said Court in my office.

Seal
U. S. Dist. Court
S. E. Div.
East. Jud. Dist.
of Mo.

In Testimony Whereof, I have hereunto
subscribed my name and affixed
the seal of the aforesaid Court
at Cape Girardeau, Missouri, this
13th day of October, A. D., 1938.

JAS. J. O'CONNOR,
Clerk,
By James M. Arnold,
Deputy Clerk.

(Endorsed): No. 11,255. Certified copy Ruling of the Court on Exceptions to Awards as to Tract No. 243. Filed in U. S. Circuit Court of Appeals on October 15, 1938.

[fol. 219] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

William H. Danforth, Appellant,
No. 11,255. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

J. L. LONDON

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 15, 1938.

(Appearance of Mr. L. John Weber and Mr. Harry C. Blanton as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

L. JOHN WEBER,
HARRY C. BLANTON.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 19, 1938.

[fol. 220] (Appearance of Mr. Charles R. Denny, Jr., as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the United States of America.

CHARLES R. DENNY, JR.,
Attorney, Dept. of Justice,
Wash. D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Nov. 14, 1938.

(Appearance of Mr. Thomas E. Harris as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

THOMAS E. HARRIS,
Attorney, Department of Justice.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
May 12, 1939.

(Order of Argument.)

October Term, 1938.

Wednesday, November 15, 1938.

(Before Judges Sanborn, Woodrough and Thomas.)

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. L. London for appellant, continued by Mr. Charles R. Denny, Jr., Attorney, Department of Justice, for appellee, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 221]

(Order of Submission.)

October Term, 1938.

Wednesday, November 16, 1938.

(Before Judges Sanborn, Woodrough and Thomas.)

This cause having been called for further hearing, argument was resumed by Mr. Charles R. Denny, Jr., Attorney, Department of Justice, for appellee, and concluded by Mr. J. L. London for appellant.

Thereupon, this cause was submitted to the Court on the manuscript of the record from said District Court and the briefs of counsel filed herein.

[fol. 222] (Opinion on First Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, A. D. 1938.

March 4, 1939.

William H. Danforth, Appellant,
No. 11,255. vs.
United States of America, Appellee.

Appeal from the District Court of the United States for
the Eastern District of Missouri.

Mr. J. L. London (Messrs. Leahy, Walther, Hecker & Ely were with him on the brief) for appellant.

Mr. Charles R. Denny, Jr., Attorney, Department of Justice (Mr. Carl McFarland, Assistant Attorney General, Mr. L. John Weber and Mr. William R. Sherwood, Special Attorneys, and Mr. Oscar A. Provost, Attorney, Department of Justice, were with him on the brief) for appellee.

• Before Sanborn, Woodrough and Thomas, Circuit Judges.

Thomas, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment entered in condemnation proceedings brought by the United States to obtain flowage rights over certain tracts of land located in Mississippi and New Madrid Counties, Missouri, pursuant to the provisions of the Mississippi Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. S. C. A. §702a et seq. The [fol. 223] appellant, claiming ownership of 1033.56 acres designated in the record as Tract No. 243, seeks to contest the award of \$17,921.70 reported by the commissioners and confirmed by the district court as damages for the condemnation of a flowage easement over this tract on the ground that the damages should have been determined to be \$31,681.98 in accordance with the terms of a contract previously executed by the parties.

The provision of the Act of May 15, 1928, pertinent to this appeal is as follows: "The Secretary of War may cause proceedings to be instituted for the acquirement by

condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price," etc., 33 U. S. C. A. §702d.

Acting under the authority of this statute and in accord with a Presidential Proclamation of December 11, 1928, the Secretary of War directed that offers for flowage easements be made to owners of land within the Birds Point-New Madrid Floodway project on the West side of the Mississippi River opposite Cairo, Illinois. This order was transmitted through the regular military channels and accordingly the following letter was sent to the appellant.

War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932.

Subject: Offer for flowage rights, Bird's Point-New Madrid Floodway.

[fol. 224] To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers,
District Engineer."

The appellant accepted this offer on March 2, 1932, having been granted an extension of time to March 15, 1932, in which to make his decision. On July 8, 1932, Major Somervell wrote to the appellant saying: "It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the court. It is not feasible for this office to recommend for an agreed verdict [fol. 225] prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the court, this office is confident that just compensation will be awarded in all cases." This letter was written as a result of the issuance of an order by the Secretary of War on April 7, 1932, that certain offers, including that made to the appellant, should be withdrawn for the reason that they were considered greatly in excess of actual values.

On September 25, 1933, the United States filed this suit seeking condemnation of flowage rights over the lands of

the appellant and others, alleging inability to agree with the defendant claimants upon the compensation to which they were entitled and praying that the court appoint disinterested commissioners to assess and award the damages occasioned by the easement. Throughout the subsequent proceedings in the court below the main contention of the appellant was that in so far as the issue of damages in respect of Tract No. 243 was involved in this action it had been previously determined by the contract between the parties, hereinbefore set out. This contention was urged to the court in the form of exceptions to the various awards reported by the commissioners, by motion to vacate the awards and to enter judgment in favor of the appellant in the sum of \$31,681.98, with interest from the time of taking, and by an answer and "counter-claim" setting forth the facts relative to the prior contract between the parties with a tender of title to the flowage easement upon condition that the United States pay \$31,681.98 into court and with a prayer that the court enter judgment in that sum. The trial court ruled adversely to the appellant's contention in every form in which it was raised.

The errors assigned by the appellant relate almost exclusively to the court's failure to enter judgment for the amount agreed upon in the contract between the parties. No question is raised as to the right of the Government to condemn the easement or to the regularity of the proceedings below aside from the contention that the court was without jurisdiction to appoint commissioners to assess the damages, that the commissioners were without jurisdiction to assess an amount different from that agreed upon in the contract with the Government and that the court should have entered judgment for that sum.

[fol. 226] In this appeal the appellant continues to urge that he was entitled to have his damages determined under the prior agreement with the Government and that the lower court was in error in appointing commissioners to make an assessment based upon actual values. On its part the Government admits that a valid and binding contract to purchase the flowage easement involved for \$31,681.98 was entered into with the appellant and subsequently repudiated. It contends, however, that sovereign immunity

from suit deprived the trial court of jurisdiction to render an affirmative judgment on a contract claim of this amount; that the appellant must pursue his remedy in the Court of Claims; and that in condemnation proceedings the court is limited to the procedure defined by the statute.

The most persuasive aspect of the appellant's argument is his contention that no separate claim is being asserted against the government. He observes that compensation in some amount was contemplated under the Fifth Amendment and the Flood Control Act of May 15, 1928; and that in this case the court was not required to determine the exact extent of the damages or to appoint commissioners for that purpose but merely to enter judgment in the amount determined by the previous agreement of the parties. But however appealing that argument is and however desirable it may be to determine all related issues in one proceeding the conclusion can not be escaped that the appellant's contention is founded upon an attempt to enforce a contractual obligation of the United States and necessarily involves the question of the jurisdiction of the district court to determine the issue and enter judgment.

It is the settled rule that a sovereign state cannot be sued without its consent, and this is true whether the issue is raised by direct suit or otherwise. *Nassau Smelting Works vs. United States*, 266 U. S. 107; *Ill. Central R. R. Co., vs. Public Utilities Comm.*, 245 U. S. 493; *Davis vs. O'Hara*, 266 U. S. 314; *Bigby vs. United States*, 188 U. S. 401; *North Dakota-Montana W. G. Ass'n. vs. United States*, 8 Cir., 66 F. (2d) 573. The jurisdiction of a federal court to entertain claims against the United States must depend upon a specific act of Congress unless the Government places itself in the position of a private suitor and thereby [fol. 227] impliedly consents to abide by an adverse determination of the issues involved. *Bull vs. United States*, 295 U. S. 247; *Nassau Smelting Works vs. United States*, *supra*; *Keifer & Keifer vs. Reconstruction Finance Corp.*, 8 Cir., 97 F. (2d) 812; *North Dakota-Montana W. G. Ass'n. vs. United States*, *supra*; *United States vs. Skinner & Eddy Corporation*, 9 Cir., 35 F. (2d) 889; *Schroeder vs. Davis*, 8 Cir., 32 F. (2d) 454; *United States vs. The Thekla*, 266 U. S. 328; *The Paquete Habana*, 189 U. S. 453; *The Gloria*, 286 F. 188; *Carr vs. United States*, 98 U. S. 433;

The Siren, 7 Wall. 152; United States vs. National City Bank of New York, 2 Cir., 83 F. (2d) 236; United States vs. Stephanidis, 41 F. (2d) 958.

The appellant does not rely on specific statutory authority to support his contention. In fact he is forced to avoid the limitations of the Tucker Act which establishes jurisdiction in the district courts concurrent with the Court of Claims to hear certain classes of claims against the United States. Section 24 of the Judicial Code, 28 U. S. C. A. §41 (20), provides that "The district courts shall have original jurisdiction as follows: * * *".

"Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *"

It is at once manifest that had the United States chosen not to institute condemnation proceedings against the appellant's property his only recourse would have been to assert a right of recovery in the Court of Claims for damages for the breach of the contract to purchase a flowage easement. The Government, however, has instituted condemnation proceedings and the appellant strenuously urges that by so doing it has submitted itself to the jurisdiction of the district court to hear and determine all claims related to the subject matter of the suit.

[fol. 228] It is true that it has been held that when the Government comes into court to enforce a claim it comes not as a sovereign but as a suitor and thereby submits to the court's adjudication of just claims relating to the subject matter involved even to the extent of becoming subject to an affirmative judgment; and this in spite of the fact

that the court has no express statutory authority to enter such a judgment. *United States vs. The Thekla*, supra; *The Paquete Habana*, supra; *The Siren*, supra; *The Nesra Senora De Regla*, 108 U. S. 92; *The Gloria*, supra. The rule has been thus broadly stated in decisions in admiralty, perhaps arising out of the necessity of determining intricate problems of liability in prize and collision cases in one action. See *The Gloria*, 286 F. 188, 203. But we have not been referred to any decision outside of admiralty in which the rule has been given the scope of permitting a defendant to recover an affirmative judgment in a suit instituted by the United States. Its application has been limited to the extent of permitting the defendant to assert a right of recoupment, set-off or counterclaim not exceeding the amount of the Government's claim and arising out of the same transaction or subject matter. *Bull vs. United States*, supra; *Gratiot vs. United States*, 15 Pet. 336; *United States vs. National City Bank of New York*, supra; *United States vs. Stephanidis*, supra; and see *United States vs. Guaranty Trust Co. of New York*, 2 Cir., 91 F. (2d) 898. In these cases it is frequently stated that the United States enters court as a private suitor and the rules applicable to individuals apply. See *Bull vs. United States*, 295 U. S. 247, 261, *The Thekla*, 266 U. S. 328, 340; *United States vs. National City Bank of New York*, 2 Cir., 83 F. (2d) 236, 238.

Two considerations bar the appellant's contention that this principle is applicable in the instant case. The first is that in the exercise of the right of eminent domain the United States is asserting a privilege inherent solely by virtue of sovereign power. *Kohl vs. United States*, 91 U. S. 367; *United States vs. Lynah*, 188 U. S. 445. In instituting proceedings to condemn an easement over the appellant's property it can not be said that the Government entered court as a private suitor. It entered court to condemn property for a public use in the exercise of its sovereign power and in no way laid aside its protective cloak of immunity from suit. The second consideration, is that the appellant is not attempting to assert a claim in opposition [fol. 229] to a money demand brought against him but is seeking to have his damages in a condemnation suit determined according to his contract with the Government

rather than by the mode provided by the statute, *supra*. This contention clearly amounts to an attempt to enforce the contract in this proceeding. The trial court had no jurisdiction to entertain his demand.

These conclusions do not conflict with the decision in *Wachovia Bank and Trust Co. vs. United States*, 4 Cir., 98 F. (2d) 609, the holding in which the appellant insists is determinative of the issue in the instant case. In that case the United States instituted proceedings to condemn a certain tract of land. Appraisers were appointed who fixed the value of the land at \$8.50 per acre. The court overruled the owner's exceptions to their report and entered an order condemning the property. On appeal the court found that the parties had completed an option contract, somewhat similar to the contract before this court, fixing the value of the land at \$8.50 per acre. Accordingly it was held that the defendant vendor was bound by the contract price, the court stating that while the commissioners in the condemnation proceedings were not bound by that price a party to the option could not complain that the price fixed therein was adopted by the commissioners. For that decision to be in point in this case it would have been necessary for the Government to have complained that the commissioners had adopted a value higher than the price fixed by the contract between the parties. But even assuming that the *Wachovia* case holds that in a situation similar to the one here presented the Government was enabled to hold the condemnee to his contract it does not follow that the converse of that proposition is true. The Government, in asserting its rights, is not bound by the same restrictions that hamper individual litigants. If a claim against the Government exceeds a certain amount the only forum open to the claimant may be the Court of Claims.

The appellant contends that he is entitled to receive interest from the time of the taking. See *Jacobs vs. United States*, 290 U. S. 13; *Seaboard Airline R. Co. vs. United States*, 261 U. S. 299; *Shoshone Tribe vs. United States*, 299 U. S. 476. The Government concedes this to be the rule but contends that the point has not been properly preserved in the appellant's assignment of errors since the [fol. 230] request to the lower court for interest is linked

with that for entry of judgment in the amount set out in the contract between the parties; the argument is that the United States is not liable for interest on a contract claim unless a contrary intention is indicated in the contract itself or by statute. The appellant is clearly entitled to interest as part of his damage and while he has not preserved that point as carefully as he might have done his requests to the court appear to have been made in that connection and it is immaterial that they were incident to his demands for recognition of the contract claim.

It remains to determine the date of the taking. The evidence is undisputed that the set-back levee was started by the Government on October 21, 1929, and that it was 98.9 per cent completed on October 31, 1932. Since the latter date no further work aside from repairs has been done on it and the project was actually placed in operation and the land flooded in 1937. We have not been referred to any case in which the issue was distinctly raised of whether a taking occurs at the time the work is started or when it is completed so far as the right to interest is concerned. The dictum in *Hurley vs. Kincaid*, 285 U. S. 95, 103, that the taking occurs as soon as the Government begins to carry out the authorized project appears to receive support in the cases cited. See also *Shoshone Tribe vs. United States*, *supra*. It follows that interest should have been allowed from October 21, 1929, to the date of judgment. The order is that the judgment be modified accordingly, and as so modified affirmed.

Modified and affirmed.

[fol. 231] (Judgment, March 6, 1939.)

(Vacated by order of March 24, 1939.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1938.

Thursday, March 6, 1939.

William H. Danforth, Appellant,
No. 11255. vs.
United States of America.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, modified to allow interest from October 21, 1929, to the date of said judgment, and as thus modified the said judgment is affirmed without the taxation of costs to either party in this Court.

March 6, 1939.

[fol. 232] In the United States Circuit Court of Appeals
for the Eighth Circuit.

William Danforth, Appellant,
No. 11255 vs. At Law
United States of America, Appellee.

On Appeal from the District Court of the United States
for the Eastern District of Missouri.

Petition of the United States for Rehearing and Brief in
Support Whereof.

Petition for Rehearing.

To the Honorable Judges of the United States Circuit
Court of Appeals for the Eighth Circuit:

Comes now the United States of America, appellee in the above-entitled cause, and presents this petition for a rehearing upon the following holding of this Court:

It remains to determine the date of the taking. The evidence is undisputed that the set-back levee was started by the Government on October 21, 1929, and that it was 98.9 percent completed on October 31, 1932. Since the latter [fol. 233] date no further work aside from repairs has been done on it, and the project was actually placed in operation and the land flooded in 1937. We have not been referred to any case in which the issue was distinctly

raised of whether a taking occurs at the time the work is started or when it is completed so far as the right to interest is concerned. The dictum in *Hurley vs. Kincaid*, 285 U. S. 95, 103, that the taking occurs as soon as the Government begins to carry out the authorized project appears to receive support in the cases cited. See also *Shoshone Tribe vs. United States*, *supra*. It follows that interest should have been allowed from October 21, 1929, to the date of judgment. The order is that the judgment be modified accordingly, and as so modified affirmed.

The petitioner respectfully shows that the question on which a rehearing is sought has never been adequately presented to the Court. Throughout the trial in the lower court the appellant's claim for interest was linked with his request for entry of judgment in the amount of the contract. The appellant never contended that he was entitled to interest as a part of the just compensation guaranteed him by the Constitution. Hence the Government did not have occasion to make a complete record on the question of a taking. The appellant's assignments of error likewise linked his claim for interest with his claim upon the contract. For these reasons the Government took the position in its brief that the appellant had not properly preserved the question of his right to interest (other than on the contract) and no argument was made with reference to a taking.

This Court has decided that the appellant has sufficiently, although not as carefully as he might, preserved the question of his right to interest as a part of just compensation. The Government is now seeking a rehearing solely on the questions of whether there has been a taking and, if so, when the taking occurred. The grounds for a rehearing are that the following material matters of law and fact were inadvertently overlooked by the Court in deciding that a taking occurred on October 21, 1929:

1. It appears from the opinion that the Court inadvertently interpreted an assumption made by Mr. Justice Brandeis in *Hurley vs. Kincaid*, 285 U. S. 95, 103-104, to be a dictum.

2. The Court did not consider the decision of the Court of Claims in *Matthews vs. United States* (No. 42408, de-

cided May 31, 1938) which is in direct conflict with the decision in the instant case.

3. The Court inadvertently overlooked pertinent provisions of the Flood Control Act.

Wherefore, for the foregoing reasons, and because of the importance and far reaching effects of the decision, [fol. 235] the petitioner respectfully requests that a rehearing be granted.

Respectfully submitted.

CHARLES E. COLLETT,
Acting Assistant Attorney General.

C. W. LEAPHART,
Special Assistant to the Attorney General.

L. JOHN WEBER,
Special Attorney, St. Louis, Mo.

CHARLES R. DENNY, JR.,

THOMAS E. ERVIN,

Attorneys,
Department of Justice, Washington, D. C.
Certificate of Counsel.

I, Charles R. Denny, Jr., counsel for the appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

CHARLES R. DENNY, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Mar. 20, 1939.

[fol. 236] (Order Granting Petition of Appellee for
Rehearing, etc.)

March Term, 1939.

Friday, March 24, 1939.

The petition for rehearing filed by counsel for appellee seeking a reversal solely on the question of whether there has been a taking, and if so, when the taking occurred, having been considered, It is ordered by this Court that the said petition, be, and is hereby, granted, but limited solely to a determination of the date of taking.

It is further ordered by this Court that the judgment heretofore entered on the opinion filed in this cause March 4, 1939, be, and it is hereby, vacated, set aside and held for naught.

This cause for the hearing of the aforesaid question is set down for Friday, May 12, 1939, at St. Paul, Minnesota, following the cases now set for hearing on that day.

March 24, 1939.

[fol. 237] (Order of Submission.)

May Term, 1939.

Friday, May 12, 1939.

9. (Before Judges Sanborn, Thomas and Sullivan.)

This cause came on to be heard in pursuance of the order of this Court granting petition of appellee for a rehearing, and argument was commenced by Mr. J. L. London for appellant, continued by Mr. Thomas E. Harris, Attorney, Department of Justice, for appellee, and concluded by Mr. J. L. London for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 238] (Opinion on Second Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,255.—MAY TERM, A. D. 1939.

William H. Danforth,

Appellant,

vs.

United States of America,

Appellee.

} Appeal from the Dis-
trict Court of the
United States for the
Eastern District of
Missouri.

[July 11, 1939.]

On Petition for Rehearing

Mr. J. L. London (Messrs. Leahy, Walther, Hecker & Ely were with him on the brief) for appellant.

Mr. Thomas E. Harris, Attorney for the Department of Justice, (Mr. Charles E. Collett, Acting Assistant Attorney General, Mr. C. W. Leaphart, Special Assistant to the Attorney General, Mr. C. R. Denny, Jr., and Mr. Jacob N. Wasserman, Attorneys for the Department of Justice, were with him on the brief) for appellee.

Before SANBORN and THOMAS, Circuit Judges, and SULLIVAN, District Judge.

THOMAS, Circuit Judge, delivered the opinion of the court.

On Petition of the Government we granted a rehearing limited to the single question of whether a taking of the appellant's property has resulted from the operations of the Government in carrying out the provisions of the Mississippi Flood Control Act of May 15, 1928, (33 U. S. C. A. 702a et seq.) and if so the date upon which the taking occurred.

The argument, as originally presented, centered around the appellant's contention that in the proceedings brought by the Government to condemn a flowage easement over his land the lower court was in error in refusing to assess the damages in accordance with the amount fixed by a contract previously executed between the Government and the appellant. We held that the appellant's contention could not be sustained. *Danforth v. United States*, 102 F. (2d) 5. That issue is not now involved.

As a subordinate issue, however, the appellant urged that he was entitled to interest from the date of the taking to the date of judgment as a part of his award. He contended that a taking had occurred on October 21, 1929, the date upon which the Government began the construction of the set-back levee; or, if not on that date, then on October 31, 1932, the date upon which the set-back

levee was substantially completed. The Government contended that the question of interest on the award was not raised and did not argue it. We concluded that, while the point was not as carefully preserved as might have been done, it was properly before us and that interest should have been allowed from October 21, 1929, the date of taking as fixed by the beginning of work on the set-back levee.

In support of its petition for a rehearing the Government insisted that a taking of the property had not, at any time, become an established fact and that the appellant was therefore not entitled to an award of interest. In order to determine the issue it will be necessary to sketch briefly the outlines of the flood control project at this point on the Mississippi and its progress at the time of the trial in the lower court.

The appellant's property lies in the alluvial valley extending along the Mississippi River from Cape Girardeau, Missouri, to the Gulf of Mexico. The tract includes more than 1000 acres and is situated in Mississippi County, Missouri, a few miles inland from the west bank of the river. It lies about half way between Birds-point and New Madrid, Missouri. Except for a few acres the land will not be affected by the backwater of the river in times of high water. With this exception the entire property is suitable for cultivation. At intervals in the past however, like other lands in the valley, this tract has been subjected to the overflow of the headwaters of the river in periods of flood. To secure protection from these periodical floods various local interests have been engaged for a number of years in constructing levees along the banks of the river. Certain of these levees have been constructed under the supervision of the Mississippi River Commission created by the Act of Congress of 1879, and the United States has contributed a share of the necessary expense as an aid in achieving a continuous levee system where needed. See *Jackson v. United States*, 230 U. S. 1. At the point of the river under consideration the riverside levee starts at the hills near Commerce, Missouri, and follows the west bank of the river down to a point near New Madrid, Missouri. Between these points the levee varies in height from 10 to 20 feet with an average height of approximately 15 feet. It has been maintained at that height for a number of years and will, if adequately sustained in floodtime, prevent the overflow of the headwaters of the river so long as they do not rise above 58 feet as measured on the gauge at Cairo, Illinois. According to previous records this levee would provide adequate protection to land of the elevation

of that of appellant's tract except when such floods as those of the years 1912, 1913, 1927 and 1937 occurred. The floods of 1912, 1913 and 1927 exceeded 57½ feet and it is probable that they could have been prevented from passing over the levee only by the exercise of great care and labor. The flood of 1937 exceeded the highest stage reached in recorded history over a period of some 80 years and could not have been prevented from overtopping the levee even by extraordinary methods of maintenance.

On May 15, 1928, Congress adopted the Mississippi River Flood Control Act, supra, based on a report commonly known as the Jadwin Plan. We have recently had occasion to refer to the pertinent parts of that Act in *Sponenbarger v. United States*, 8 Cir., 101 F. (2d) 506, and it is unnecessary to review them here. It will be sufficient to state that in general the Flood Control Act contemplates the construction of lateral floodways adjacent to certain sections of the Mississippi River through which the excess waters may be diverted in flood periods in order to relieve the main channel of water that it cannot carry. The theory of the plan is that a large portion of the lands now subject to overflow will receive complete protection if the flow of the surplus flood water is confined within the limits of floodways built at certain strategic points along the river.

The Birdspoint-New Madrid Floodway is one of the projects included in the plan. Beginning on the north at Birdspoint, Missouri, the outer or western limit of the floodway is defined by a set-back levee. This levee includes many thousands of acres of land between it and the riverside levee. It was substantially completed on October 31, 1932. It is, however, only one essential element in the plan. The riverside levee remains at its original height and offers the same protection against overflow that it has since it was originally constructed. To complete the plan upper and lower fuse plug sections are to be created in the riverside levee. The upper fuse plug will be made by reducing the height of the riverside levee about 3 feet for a distance of eleven miles below Birdspoint, Missouri, in order to permit the excess flood waters to flow into the floodway whenever the river reaches a stage of 55 feet on the Cairo gauge. By a similar reduction in the height of the levee for a distance of about five miles above New Madrid, Missouri, the water will return to the main channel. A drainage system is to be constructed at this point to empty the floodway when the flood subsides. Since the lands within the floodway now enjoy protection against floods of an average height

of 58 feet on the Cairo gauge they will be subjected to the hazard of more frequent overflow upon the reduction of the fuse plug sections.

The appellant's land lies in the floodway; the completed set-back levee proceeds along the western border of his land a strip of which was condemned by the Government for that purpose. He does, however, enjoy the same use of his land that he has always had. As the project now stands, and as it has stood since the completion of the set-back levee in 1932, the only possible result of the operations of the Government to date is that a flood of sufficient height to flow over the riverside levee will be confined within the limits of the floodway thereby increasing the depth of the water covering appellant's land. According to the testimony the probable effect will be an increase in the damage to the buildings and other structures on the property. The 1937 flood did go over the riverside levee but the record does not indicate whether any increased damage actually resulted.

Section 4 of the Act (33 U. S. C. A. 702-D) directs that "the United States shall provide flowage rights for *additional* destructive flood waters that will pass *by reason of diversion from the main channel* of the Mississippi River; . . . The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project." (Italics supplied).

It does not follow, however, that the increased depth of water to which the appellant's lands will be subject upon the completion of the set-back levee is the "additional destructive floodwaters" referred to in the Act. We do not so construe it.

The act was obviously intended to provide for flowage easements in those cases where the operations of the Government will actually result in the hazard of a more frequent diversion of flood water from the river over the lands involved in the project. The appellant's land will be subject to this hazard upon the completion of the fuse plugs contemplated by the plan. A flowage easement over his land was accordingly sought and his damages assessed. But it is obvious that the set-back levee does not tend to divert any additional water from the main channel of the river; and the Government cannot be held to have taken the appellant's property merely by reason of its construction. It in no way deprived him of any of the rights attributable to his ownership of the

property. He enjoys identically the same protection from overflow that he has always had. The mere fact that the effect of the set-back levee may be to increase the depth of the water on a part of his premises in the event of a major flood is an incidental consequence for which the Government cannot be held liable. See *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Sanguinetti v. United States*, 264 U. S. 146; *Gibson v. United States*, 166 U. S. 269; *Matthews v. United States*, Ct. of Cl. (Decided May 31, 1938).

The appellant contends that upon the practical completion of the set-back levee in 1932 the Government was in a position to put the floodway into operation at any time thereafter, and that this right constituted a taking of his property. His theory is that the Government could dynamite the riverside levee at will and achieve the same result as it would had it actually completed the construction of the fuse plugs. We are not referred to any authority for this proposition other than the fact that Government officers actually did dynamite the levee during the flood of 1937 although at the time the charges were exploded the river had already broken natural crevasses in the riverside levee and the only effect appears to have been a hastening of an otherwise inevitable flow of water into the floodway. It is true that in the *Sponenbarger* case, *supra*, we referred to the fact that the Jadwin Plan provided that the fuse plug there involved might be "blown" or crevassed if found necessary to hasten diversion. Assuming that the same provision is applicable here it does not follow that the Government may rightfully place the floodway in operation by dynamiting the existing levee prior to its completion of the fuse plug sections. Section 1 of the Act (33 U. S. C. A. § 702a) provides "That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway" The appellant does not contend that the acts of the Government officers in dynamiting the levee in 1937 constituted a taking of his property on that date but merely that it indicated the Government's view of its right to place the floodway in operation. The Government contends that acts of these officers were not authorized by their superiors. In any event their acts cannot prevail over the plain mandate of the statute, and we are inclined to attach but little importance to them since they were done in the midst of the pressing emergency and at a time when the appellant's land was subject to an inevitable overflow.

In an effort to bring himself within the scope of the Sponenbarger case the appellant argues that the landowners in this floodway have been deprived of their right of "self-defense", that is, their right to raise the existing riverside levee and thereby gain additional protection from such floods as may occur in the future. No authority is cited for the argument. So far as it appears in the record the title to the riverside levee remains in the existing local levee districts, and we find nothing in the Flood Control Act to prevent the raising of the levee at any time prior to the construction of the fuse plug sections. The situation is materially different from that in the Sponenbarger case where we were of the opinion that under the terms of the Act the United States had assumed dominion over the riverside levee. A fuse plug section had already been created in that case by raising the riverside levee above and below and on the opposite bank of the river. The Government having thus taken control and completed the upper fuse plug, the owners of land in the floodway were deprived of their right of "self-defense" against threatened flood. In the instant case it does not appear that the Government has assumed dominion over the riverside levee. It may do so at some future date or it may abandon the entire project.

Upon a reconsideration of the facts and of the law we reach the conclusion that appellant's land will not be taken within the meaning of the Act until the upper fuse plug in the riverside levee shall be opened and the land is exposed to "additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River." The result is that the judgment appealed from is

Affirmed.

[fol. 245] (Judgment, July 11, 1939.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Tuesday, July 11, 1939.

William H. Danforth, Appellant,

No. 11255. vs.

United States of America.

Appeal from the District Court of the United States for
the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri after granting of petition of appellee for a rehearing, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

July 11, 1939.

[fol. 246] (Motion of Appellant for Stay of Mandate.)

Comes now appellant in the above entitled cause and moves the Court to stay the mandate in the same, and as grounds for said motion states that appellant is preparing and will file an application for writ of certiorari to the Supreme Court of the United States in the above matter.

WILLIAM H. DANFORTH,
Appellant.

By J. L. London,
Attorney.

State of Missouri,
City of St. Louis—ss.:

J. L. London, of lawful age, being duly sworn upon his oath states that he is attorney of record for appellant; that he is now working on and preparing a petition for writ of certiorari to the Supreme Court of the United States; and further states that the above motion is not made for vexation or delay, but in order to preserve the proper status of the above case until a final determination by the said Supreme Court of the United States.

J. L. LONDON.

Subscribed and sworn to before me this 20th day of July,
1939.

HORTENSE GANNON,
Notary Public.

(Seal)

My commission expires 2/12/41.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 21, 1939.

[fol. 247] (Order Staying Issuance of Mandate.)

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Dated July 24, 1939.

ARCHIBALD K. GARDNER,
U. S. Circuit Judge.

(Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 26, 1939.

[fol. 248] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein William H. Danforth was Appellant and the United States of America was Appellee, No. 11255, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 156.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(4234)

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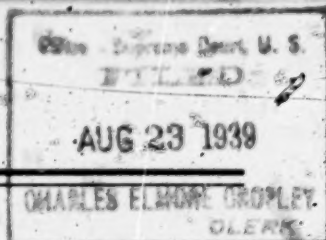
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No. 309



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Counsel for Petitioner.

LEAHY, WALTHER, HECKER & ELY,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

The petitioner, William H. Danforth, an individual, respectfully shows to the Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit brought by the United States to obtain an easement for flowage rights over the petitioner's farm, consisting of 1,033.56 acres in Mississippi County, Missouri, pursuant to the Floodway Act of May 15, 1928 (R. p. 4).

The Government, pursuant to the said act, and as part of the project, had previously condemned and taken 105.34 acres extending along the whole western side of this farm (Exhibit A—hereto attached) and used the same as part of the set-back levee (R. p. 237), which was built from Bird's Point in a general southwestern direction to New Madrid.

This set-back levee was begun October 21, 1929, and was 98.9 per cent completed on October 31, 1932. For all practical purposes the levee was completed on October 31, 1932 (R. p. 196). Since that time the only work done was to replace slides (R. p. 196).

The said act provides, among other things (Sec. 702D):

• • • “When the owner of any land, easement or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price. • • •”

The act in question refers to the engineering plan submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, First Session, and authorizes the project to be prosecuted under the **direction** of the **Secretary of War** and the supervision of the **Chief of Engineers**. Pursuant to authority under the act of **Section 1** of the same **the President** of the United States approved the Board provided for in the act, and reserved the right to make provisions for acquiring rights in land for constructing spillways and floodways. Accordingly, on December 11, 1928, he issued a presidential proclamation in connection with acquiring flowage rights, in which proclamation he provided for the purchase of flowage rights over the land within the floodway, between the existing river-side levee and the back (westward) levee, and in which he provided “that in no case shall the purchase price for the

flowage on the land above the backwater area in the southern part of the floodway be more than 66 per cent of the present assessed valuation of this land" (R. p. 193). (Emphasis ours.)

Pursuant to the said law and the said presidential proclamation, and within the said 66 per cent, of the then assessed value (R. p. 195) the Secretary of War, through military channels, offered the petitioner the sum of \$31,681.98 for flowage rights over the above mentioned tract of land (R. p. 164). This was duly accepted by petitioner within the time authorized by the Government (R. p. 170, Exhibit K). Prior to the time that the said offer of \$31,681.98 was made, the Government had had three appraisals made, one by the Department of Agriculture, one by army engineers, and one by local men (R. p. 160). Several months after the acceptance of the Government's offer by petitioner, the Government, through the same military officer, Major Brehon Somervell, wrote to petitioner withdrawing the said proposition (R. p. 185). The offer and acceptance were couched in the following language:

“War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer of flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by

order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incls.

Tract map;
General map of floodway;
Addressed return envelope.

Accepted: Wm. H. Danforth,
(Owner)
c/o Purina Mills,
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

Following its repudiation of the agreement fixing the damages, the Government filed a condemnation suit on September 25, 1933, for the flowage rights over the said tract of land (R. p. 4). The petitioner filed an answer and counterclaims in said suit, setting out the written offer of the Government and the petitioner's acceptance of the same within the time authorized by the Government (R. p. 21). The said pleadings also denied the allegations in the Government's petition that the parties were unable to agree upon the amount of flowage damage (R. p. 22). The said pleadings also set out that the actual damages were in excess of \$31,681.98, but that the said sum was accepted as a compromise and settlement, and that the parties had by contract fixed that sum for the flowage easements (R. p. 21). The counterclaim prayed for judgment against the Government in the sum of \$31,681.98 with interest, and further prayed that the Court decree an easement in favor of the Government for the perpetual flowage easement (R. p. 25).

The allegations of the answer and counterclaim were conclusively proven through depositions taken of ex-Secretary of War, Patrick J. Hurley, Major-General Edward M. Markham, Chief of Engineers, and Major Brehon Somervell the officer in charge at Memphis, who was ordered by the Secretary of War to make the offer aforesaid (R. pp. 116-128). Although the said answer and counterclaim were duly filed, by leave of Court, upon motion of the Government, the Court struck the same out upon the theory that a counterclaim could not be filed in the case because, as the Court stated, the Government, even when acting through its appointed authorities, could not agree to limit the jurisdiction of the Court (R. p. 40).

At every step this petitioner claimed that the agreement in question fixing the damages or value of the flowage rights was binding, and after the Court struck out the

said answer and counterclaim, raised the same issue in exceptions filed to the viewers' report (R. pp. 57 and 68), and also filed a motion for judgment setting out the same facts set out in the answer and counterclaim (R. p. 41).

The Court ruled adversely to this petitioner, one District Judge ruling that an answer and counterclaim would not lie. (R. p. 40), the successor holding that an answer should have been filed (R. p. 49), overlooking the fact that same had been stricken from the record by the first trial judge. The Court, over petitioner's objections and exceptions, appointed viewers, and affirmed an award of \$17,921.70, after overruling the motion of the petitioner for judgment in the sum of \$31,681.98 (R. p. 78).

Deeds of trust aggregating \$48,000 on the property in question were paid off in full to the Northwestern Mutual Life Insurance Company prior to the last hearing, so that petitioner is the only one who has any interest in the land (R. p. 89).

Lieutenant-Colonel Eugene Reybold of the Corps of Engineers, U. S. Army, stationed at Memphis, Tennessee, had charge of the district in question in January, 1937. At that time he issued instructions to dynamite the levee during a flood in January of 1937, or as the Colonel testified, "he placed the Bird's Point-New Madrid Floodway in operation" (R. p. 199). Major R. D. Burdick also testified that he was authorized and directed to open the fuse plug section of the levee to place the said project in operation in January, 1937 (R. p. 201). The evidence showed that just prior to the time of the Floodway Act in 1928 the Northwestern Mutual Life Insurance Company was lending money on a basis of \$50.00 an acre in the area where this land was located; that they did not make any loans since the Floodway Act went into effect in areas within the spillway, although they had applications for them (R. p. 187).

The trial court refused to allow interest on the said award of \$17,921.70, holding that there has been no "taking."

This case was argued twice before the Court of Appeals. In the first opinion of March 4, 1939, reported 102 Fed. (2nd) 5, the Court of Appeals modified the judgment of the trial court to the extent of holding that there was a "taking" as of October 21, 1929, and allowed interest as of that date, but held that while the contract between the Government and this petitioner fixing the damages was valid and binding and could be enforced by the Government, it could not be enforced by the landowner in the District Court in the suit at bar (R. pp. 224-225). On motion for rehearing, filed by the Government, the Court of Appeals set aside the judgment which it had entered, and set the case down for rehearing on May 12, 1939, limiting the argument only to the question of when there was a taking (R. p. 232). Under date of July 11, 1939, the Court of Appeals affirmed the judgment of the trial court, reversing itself on the question "of taking," and holding that the property in question has not yet been taken, although the same court, under date of February 8, 1939, in the case of **Sponenbarger et al. v. United States**, 101 Fed. (2nd) 506, a suit coming up from the District Court for the Eastern District of Arkansas under the same Act of May 15, 1928, under similar facts, held that there was a "taking." This Court has recently granted certiorari in the Sponenbarger case. There is also now pending before this Court on certiorari the case of **Franklin et al. v. United States**, 101 Fed. (2nd) 459, involving the question of a "taking" and arising under the same Flood Control Act of May 15, 1928, coming up from the Sixth Circuit. In the Franklin case the Court of Appeals for the Sixth Circuit held there was no taking or appropriation, with Circuit Judge Hamilton dissenting. In the case at bar the Court of Appeals for the

Eighth Circuit **first** held there was a taking, and now has reversed itself and holds that there has been **no** taking.

II.

The principal questions involved are:

1.

Did the Government "**appropriate or take**" an easement in the land in question within the meaning of the Fifth Amendment, either

a) When it started to work on the set-back levee on October 21, 1929, or

b) On October 31, 1932, when the set-back levee was completed, or

c) When Congress passed the Flood Control Act May 15, 1928 (33 U. S. C. A., par. 702a et seq.), and adopted a plan of flood control, which involves an intentional, additional, occasional flooding of complainant's land as soon as the Government began to carry out the project authorized?

2.

Does the rule of law announced by this Court in a number of cases to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter, apply only as held by the Court of Appeals to admiralty cases (R. p. 227), or does the rule apply also to law cases?

a. Can the United States repudiate an admittedly valid contract duly and lawfully entered into, fixing the value of an easement or the damages occasioned by the Floodway Act project, then bring condemnation proceedings, and claim sovereign immunity when the said contract is as-

serted in the condemnation suit as the agreed measure of damages?

III.

REASONS FOR GRANTING THE WRIT.

A.

Question of Taking.

a) The Court of Appeals for the Eighth Circuit in holding that there was no taking of the easement in question has decided the question probably in conflict with the following applicable decisions of the Supreme Court, particularly the case of *Hurley v. Kincaid*, 285 U. S. 95, involving the same question and construing the same act, where the Supreme Court said:

"We may assume that as charged the mere adoption by Congress of the Plan of Floodway Control, which involves an intentional, additional, occasional flooding of complainant's land, constitutes a taking of it, . . . as soon as the Government undertakes to carry out the contract authorized."

Jacobs v. U. S., 290 U. S. 13, holding that intermittent overflows of agricultural land, in consequence of the construction of a dam by the Government, is a partial taking.

U. S. v. Lynah, 188 U. S. 445, holding that a rice plantation becoming a bog as a necessary result of an improvement in navigation constitutes a taking, for which the United States is liable, although the taking is in the exercise of the Government's power to improve navigation.

Pumpelly v. Green Bay & Miss. Canal Co., 80 U. S. 166, holding that the backing of water so as to overflow land or any other superinduced addition of water, earth, sand, etc., or artificial structure placed on land, if done under

statutes authorizing the same for public benefit, constitutes a taking and demands compensation.

United States v. Cress, 243 U. S. 316, holding that compensation must be paid to the owner of land affected by backwater resulting from construction and maintenance by the United States in aid of navigation of a lock and dam upon a river, whereby the level of such river along stretches is raised.

b) The opinion of the Circuit Court of Appeals is in direct conflict with United States et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5), passing upon the same question and construing the same act, sustaining the District Court, 35 Fed. (2nd) 235, and 37 Fed. (2nd) 602, holding that there is a taking under identically the same facts as in the case at bar and under the same act.

c) The opinion of the Court of Appeals is also in conflict with a very well reasoned case construing the same act on the same question in an able opinion by Borah, District Judge for the Eastern District of Louisiana, handed down August 22, 1933. U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366. This was appealed by the Government and reversed and remanded upon stipulation of the parties, a settlement apparently having been effected. 67 Fed. (2nd) 1019.

d) The opinion is in direct conflict with the case of Sponenbarger v. U. S., 101 Fed. (2nd) 506, decided February 5, 1939, by the Circuit Court of Appeals for the Eighth Circuit. Identically the same question is involved, under the same act. In the Sponenbarger case the Court of Appeals held; (1) that the floodway was in operation; (2) that the landowner's protection was decreased; (3) that Congress by the passage of the Flood Control Act of 1928 adopted the Jadwin plan as a fixed project in all of

its essential features; (4) that Congress has assumed exclusive control of the fuseplug levee, thereby excluding property owners from their right of self-defense against floods. (The Court of Appeals in the case at bar has repudiated the above four holdings.)

This Court has recently granted certiorari in the Sponenbarger case. It would add but little to the burdens of the Court to consider the case at bar at the same time.

e) This Court also recently granted certiorari in the case of Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6), where the Court held that the construction by the Government of dikes on the bank and bed of the Mississippi River for the purpose of changing the current to improve navigation, resulting in washing away of plaintiff's land on opposite sides of the river, was not an appropriation.

f) The opinion contravenes the provisions of the Floodway Act of May 15, 1928, Title 33, Sec. 702a, Sec. 702b, Sec. 702c and Sec. 702d, U. S. C. A. The said Flood Control Act is set out in the Appendix.

g) The opinion is untenable and is in conflict with the overwhelming weight of authority (Lewis on Eminent Domain, Par. 65, and cases therein cited; Nichols on Eminent Domain, Par. 436, p. 1147, and cases cited).

h) If this Court holds that there was a taking in the Sponenbarger and in the Franklin cases, *supra*, this petitioner would be deprived of his property, although this Court will have thus declared the principles announced by the Court of Appeals as erroneous, unless this Court grants certiorari in the case at bar.

i) The question is of great public importance.

There are many cases pending involving the same question of "taking" under the said Floodway Act of 1928, as

shown by the Government records in the District Court for the Eastern District of Arkansas.

B.

On Question of Recovering Value of Easement as Fixed by Contract Between Government and Petitioner.

a) The Court of Appeals in holding that the Government could enforce the contract fixing the value of the easement while the landowner cannot assert the same in a suit brought by the Government to condemn the easement has decided a question probably in conflict with applicable decisions of the Supreme Court as follows:—

Luckenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328, holding that the bringing of a suit by the United States carries with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act, and further holding that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done in regard to the subject matter.

In The Nuestra Señora de Regla, 108 U. S. 92, holding that when the Government brings a proceeding in one of its own courts that it is bound by the submission, and it is the duty of the Court to proceed to the final determination of all of the questions legitimately involved.

In The Paquette Habana, 189 U. S. 453, holding that where the United States files a proceeding in court, that an affirmative decree may be rendered against the United States in the said proceeding.

See, also, United States v. Wilkins, 6 Wheat. 135; Gratiot v. U. S., 15 Pet. 336; U. S. v. Bank of Metropolis, 15 Pet. 377; Bull v. U. S., 295 U. S. 247.

b) The opinion of the Court of Appeals is in direct conflict with decisions of other federal courts on the same question.

The Gloria, 286 Fed. 188;

U. S. v. Stephanidis, 41 Fed. (2nd) 958, aff. 47 Fed. (2nd) 554 (C. C. A. 2);

Wachovia Bank & Trust Co. etc. v. U. S., 98 Fed. (2nd) 609 (C. C. A. 4);

The Barbara Cates, 17 Fed. Supp. 241, l. c. 244;

U. S. v. Guaranty Co., 91 Fed. (2nd) 898 (C. C. A. 2);

U. S. v. Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

c) The opinion is untenable and in direct conflict with the overwhelming weight of authority (Cases cited supra under b).

d) The question is of great public importance and calls for a pronouncement of this Court on the rights of members of the public to have their rights against the United States decided in the same proceeding brought by the United States where such rights grow out of the same subject matter or transaction.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, demanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered 11,255, entitled on its docket William H. Danforth, Appellant, v. United States of America, Appellee, #11,255, at law, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein

of the said Circuit Court be reversed, and for such further relief as to the Court may seem proper.

Dated August 21st, 1939.

WILLIAM H. DANFORTH,

By J. L. LONDON,
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St. Louis, Missouri,
Counsel for Petitioner.

LEAHY, WALTHER, HECKER & ELY,
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St. Louis, Missouri,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The second opinion of the United States Circuit Court of Appeals for the Eighth Circuit was handed down July 11, 1939 (not yet reported). The first opinion of the Court of Appeals appears in 102 Fed. (2nd) 5.

II.

JURISDICTION.

1. The statutory provision which we believe sustains it is Judicial Code, Section 240 (a), amended February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

2. The date of the judgment to be reviewed is July 11, 1939.

3. The facts showing jurisdiction have heretofore been set out in the petition under the heading "Statement of Matter Involved." The judgment of the Court of Appeals holding that there has been no taking is set out (R. p. 239). The judgment of the Court of Appeals holding that the trial court had no jurisdiction to fix the amount of damages as per contract of the parties is set out (R. pp. 227-228).

The Floodway Act of May 15, 1928, which is violated by the opinion of the Court of Appeals, is referred to (R. pp. 4-5) in the Government's petition.

The following decisions sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the two questions involved for the reasons set out in the specifications of error:

A.

On question of "taking."

- Hurley v. Kincaid, 285 U. S. 95;
- Jacobs v. U. S., 290 U. S. 13;
- U. S. v. Lynah, 188 U. S. 445;
- Pumpelly v. Canal Co., 80 U. S. 166;
- U. S. v. Cress, 243 U. S. 316;
- U. S. et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5);
- U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366 (reversed on stipulation, 67 Fed. [2nd] 1019);
- Sponenbarger v. U. S., 101 Fed. (2nd) 506 (C. C. A. 8) (now pending in this court on certiorari);
- Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6) (now pending before this Court on certiorari).

B.

On the question of the jurisdiction of the trial court to fix the damages as per contract.

- Luckenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328;
- Bull v. U. S., 295 U. S. 247;
- The Nuestra Señors de Regla, 108 U. S. 92;
- The Paquete Habana, 189 U. S. 453;
- U. S. v. Stephanidis et al., 41 Fed. (2) 958, aff. 47 Fed. (2) 554 (C. C. A. 2);
- Wachovia Bank & Trust Co., Giaridan etc. v. United States (decided Aug. 26, 1938, by United States Circuit Court of Appeals, Fourth Circuit), 98 Fed. (2nd) 609 (C. C. A. 4);
- U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2nd) 898 (C. C. A. 2);
- U. S. v. Nat. City Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

III.

A full statement of the case has been given in the petition under the heading, "Statement of Matter Involved,"

which, in the interest of brevity, is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

I.

On Question of Taking.

The Circuit Court of Appeals for the Eighth Circuit erred in the following particulars, to wit:

(1) In holding that the building of the set-back levee was only one essential element in the Jadwin Plan, and that there can be no taking until the height of the upper fuse plug section is reduced about three feet for a distance of eleven miles below Bird's Point, Missouri, and for a distance of about five miles from New Madrid, Missouri (R. p. 236).

(2) In holding that petitioner still enjoys the same use of his land that he always has, although the Government has condemned and taken possession of 105.34 acres along the western part of the farm in question as part of the set-back levee pursuant to the said Floodway Act, and in holding that increasing the depth of water over appellant's land artificially through the building of the set-back levee does not increase the damage to plaintiff's property (R. pp. 237-238).

(3) In holding that the increased depth of water to which appellant's lands are subjected are not the "additional destructive flood waters" referred to in the Act of May 15, 1928, and erred in holding that the increased depth of the water is an incidental consequence for which the Government cannot be held liable (R. p. 237).

(4) In holding that the military officers in charge of the floodway area had no authority to dynamite the existing river levee prior to the completion of the fuse plug section (R. p. 238).

(5) In holding that there is nothing in the Flood Control Act to prevent the raising of the levees by the existing local levee district prior to the construction of the fuse plug sections (R. p. 239).

(6) In holding that the Government had not assumed dominion over the river side levee, although after the flood of 1937 the Government first ordered it to be rebuilt to fifty-five feet and then changed the plan and ordered it built to fifty-eight feet (R. pp. 200, 239).

(7) In holding (R. p. 239) that "appellant's land will not be taken within the meaning of the Act until the upper fuse plug in the riverside levee shall be opened and the land is exposed to additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River."

II.

On Question of Jurisdiction of the Trial Court.

(8) In holding that the District Court had no jurisdiction to hear petitioner's claim or to enter a judgment in the condemnation proceeding upon an admittedly valid contract fixing the extent of the damages for the flowage rights then being taken by court proceedings.

(9) In holding that the rule announced by the Supreme Court to the effect that when the United States comes into court to enforce a claim, it comes not as a sovereign, but as a suitor, and thereby submits to the Court's jurisdiction of just claims relating to the subject matter in-

volved, even to the extent of becoming subject to an affirmative judgment, **is limited** to suits in **admiralty**.

(10) In holding that there is a difference between suits brought by the United States in condemnation proceedings and in other proceedings so far as the character in which the Government brings the suit:

(11) In holding that there is a difference between asserting a claim in opposition to a money demand brought by the Government and to a demand brought by the Government for flowage rights over plaintiff's property.

SYNOPSIS OF ARGUMENT.

A.

Petitioner claims there was a taking, either when the set-back levee was started on October 21, 1929, or at any rate when it was completed on October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of flood control. The decision violates the Flood Control Act itself, which is set out in the Appendix, particularly Sections 3 and 4, providing for procedure on the part of the United States to acquire floodage rights, and providing for the purchase of such floodage rights by the Secretary of War, when, in his opinion, he deems the price reasonable. The decisions supporting the petitioner's contention that there was a taking are set out under Point II of the brief in support of authorities showing jurisdiction of this Court (p. 16).

The opinion of the Court of Appeals in the case at bar is in direct conflict with the case of *Sponenbarger v. United States*, 191 Fed. (2d) 506, now pending on certiorari, and in conflict with the decisions cited under Subdivision A, Point II, of the Petitioner's Brief, dealing with the jurisdiction of this Court.

The Court of Appeals in its opinion has repudiated its conclusions of law in the Sponenbarger case, and the opinion is in conflict with the Court of Appeals in the case of U.S. et al. v. Lincaid, 49 Fed. (2d) 768 (C. C. A. 5), as well as the other cases cited under Subdivision A of Point II of the brief.

B.

The Trial Court had jurisdiction to fix the damages in accordance with the contract entered into by the United States and this petitioner, prior to the filing of the condemnation suit by the Government. The Government having filed suit, the petitioner was entitled to assert his rights under the contract in question, which the Government admits is a valid contract, but simply contends that it cannot be enforced in a suit filed by the United States to acquire the same floodage rights involved. The decisions are the other way (Authorities cited under Subdivision B of Point II of Petitioner's Brief).

ARGUMENT.

Question of Taking.

We have heretofore adverted to the decisions of this Court and of other courts of appeal, as well as to the Sponenbarger case, decided by the Circuit Court of Appeals for the Eighth Circuit, now pending before this Court on certiorari, in which the question of taking has been determined. It is obvious that the Court of Appeals for the Eighth Circuit is very undecided on the question. It held there was a taking in the Sponenbarger case on February 27, 1939. In the instant case, in an opinion handed down March 4, 1939, the Court of Appeals likewise held that there was a taking when the set-back levee was started on October 21, 1929. This Court granted certiorari in the Sponenbarger case June 5, 1939. On the Government's motion for rehearing, the Court of Appeals reversed its ruling of March 4th, and on July 11th handed down an opinion holding that there was no taking. The Court makes a feeble attempt to distinguish the Sponenbarger case by holding that in the Sponenbarger case "under the terms of the act the United States had assumed dominion over the Riverside levee. It is interesting to note that in the Sponenbarger case the Government had not instituted condemnation proceedings. The suit was brought by the landowner against the Government. The Court of Appeals in the Sponenbarger case found:

1. "Without question, in the passage of this Act, Congress has assumed control of this fuse plug, and, by entering a field within its jurisdiction, has excluded all local interference with its national powers. * * *

In fact the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the

expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection."

2. That the Floodway Act was one plan and when the Government began to carry it out that there was a taking.

3. That by the provisions of the plan the flood control is subjected to a planned and practically certain overflow in case of the major floods contemplated and described.

4. That

"So considered, a reasonable construction of Section 4 of the Act of May 15, 1928 (33 U. S. C. A., Sec. 702-d), must regard such as the 'additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River,' for which the United States shall provide flowage rights (Section 4, Act May 15, 1928)."

The Court of Appeals in the *Sponenbarger* case quotes with approval from one of the briefs of counsel as follows:

"The Government has deprived the Boeuf Basin landowners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice the existing levees when necessary to accomplish the general purpose."

Compare this holding with the holding in the case at bar, by the same Court, in the last opinion (Rec. p. 234), that the increased depth of water to which this petitioner's land will be subjected upon the completion of the set-back levee is not the additional destructive floodway tiers referred to in the act, just the contrary of the holding in the Sponenbarger case. Compare the holding in the case at bar that there was no taking with the four reasons set out above in the Sponenbarger case that there was a taking.

The Court of Appeals cites (R. p. 238) *Bedford v. U. S.*, 192 U. S. 217; *Jackson v. U. S.*, 230 U. S. 1; *Sanguinetti v. U. S.*, 264 U. S. 146; *Gibson v. U. S.*, 166 U. S. 269, to support its holding that the increase of the depth of water occasioned by the set-back levee is only an incidental consequence for which the Government is not liable.

These cases do not so hold. We refrain from analyzing them only for the sake of brevity. None of them announce such an incredible principle. When considered in the light of the facts these cases do not militate against the *Jacobs*, *Lynah*, *Pumpelly* and *Cress* cases, cited under "Taking," supra page 16.

See the distinction pointed out in the dissenting opinion of Judge Hamilton in *Franklin v. U. S.*, cited supra.

This Court, in *Hurley v. Kincaid*, supra, in construing the same act, assumed there was a taking even before condemnation proceedings were filed. This Court held there was a taking in *Jacobs v. U. S.*, 290 U. S. 13, where the Government constructed a dam and intermittently overflowed agricultural land in consequence of the construction; held there was a taking in *U. S. v. Lynah*, 188 U. S. 445, where a rice plantation was affected as a result of improvements in navigation; held there was a taking in *Pumpelly v. Canal Co.*, 80 U. S. 166, where water was backed up so as

to overflow land, pursuant to statute; held there was a taking in *U. S. v. Cress*, 243 U. S. 316, where a lock and dam were constructed by the Government in a river whereby the level of the river was raised and the land of the claimant was effected thereby. See also the following cases:

- *U. S. v. Grizzard*, 219 U. S. 180;
- *Hopkins v. Clemson College*, 221 U. S. 636;
- *Peabody v. U. S.*, 231 U. S. 530.

We have a decision construing the Act in question under circumstances practically identical with those in the case at bar by the Circuit Court of Appeals for the Fifth Circuit: *United States et al. v. Kincaid*, 49 Fed. (2nd) 768, and a decision of the Eighth Circuit, *Sponenbarger v. U. S.*, 101 Fed. (2nd) 506, now pending here on certiorari, holding that there is a taking, and we have the case of *Franklin v. U. S.*, 101 Fed. (2nd) 459, Sixth Circuit, under the same act, under somewhat different circumstances, holding there was no taking. (Certiorari granted by this Court.) We now have the case at bar under the same Floodway Act, in which the Court of Appeals for the Eighth Circuit, in its ruling, holds there has been no taking. Some of the Courts of Appeal fail to distinguish the cases where the Government is acting pursuant to law and contemplates compensation and those where the action is tortious and not pursuant to law. In the one case there is an intention to take; in the other there is not. There is also a decision of the Court of Claims construing the said Act and holding there was no taking, although the Court was largely influenced by the fact that the land therein involved was timber land and in the back-water area, having a very low elevation. *Mathews v. U. S.*, 87 C. Cls. 662. The land in question is high and out of the back-water area (R. p. 189).

This conflict of opinions, together with the plain language or mandate of the Flood Control Act of May 15,

1928, itself, C. 569, 45 Stat. 534, U. S. C., Title 33, Sec. 702a et seq., completely justifies this Court in assuming jurisdiction to settle the question of a "taking."

II.

• On the question of jurisdiction of the trial court to fix damages as per contract.

In the Government's brief, filed in the Court of Appeals, the Government had the following to say:

"It may be true that to attain complete justice in one proceeding the appellant should be allowed in the District Court any recovery on the contract to which he may be entitled, especially since the United States could, had it chosen to do so, have enforced it in that forum against him."

The position of the Government, however, and that of the Court of Appeals is that while the Government could enforce the contract in question in the proceeding in this case, the other party to the contract cannot. The Court of Appeals holds that the rulings of this Court on the question here involved are limited to cases of **admiralty**, and that rights against the Government cannot be enforced in Proceedings started by the Government, even though pertaining to the same subject matter or growing out of the same transaction. The rule we here contend for has been considerably extended in recent years.

Bull v. U. S., 295 U. S. 247;

U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2d) 898, 1 c. 900 (C. C. A. 2);

U. S. v. National City Bank of N. Y., 83 Fed. (2d) 236 (C. C. A. 2).

If the Government had not brought the suit herein involved there would be a different situation, but having brought the suit in which it sought to have the damages assessed the landowner had a right to ask the Court to fix

the damages at the amount contracted for by the parties prior to the bringing of the suit. The claim grew out of the same transaction, was permitted under the terms of the Act itself, the contract was **admittedly a valid and binding contract**, and was enforceable in the trial court under the decisions of this Court and the other courts of appeals, cited *supra*.

In *Wachovia Bank & Trust Co., Guardian, etc. v. U. S.*, decided August 26, 1938, by the United States Circuit Court of Appeals, Fourth Circuit, 98 Fed. (2nd) 609, the Government enforced a similar contract to purchase land at \$8.50 an acre. The Court of Appeals for the Fourth Circuit held that the trial court did not err in refusing to hear evidence tending to prove values, and that the parties were bound by the contract price. The petitioner in the case at bar contended in the trial court that the parties were bound by the price fixed in the contract, but the trial court struck out the answer raising this issue; this violated the substantive rights of this petitioner.

Fuller v. Claffin, 93 U. S. 14;

In re Gloria, 286 Fed. 188.

CONCLUSION.

It will thus be seen that the two questions presented for this Court's consideration are questions of great importance. The question of "**taking**" involve large public interests and, as we have indicated above, there are numerous cases now pending involving this question and the question is now pending on certiorari before this Court in the two cases mentioned above that we know of. It would be a manifest injustice for the three months period to expire within which time certiorari can be applied for in the case at bar, and then in all probability have this Court hold that there is a taking in the said two companion cases now pending on certiorari in this court. We sin-

cerely hope that in the interest of justice and equity, this Court will grant the writ, assume jurisdiction and grant a hearing in the case at bar along with the Sponenbarger case and Franklin cases.

The question of enforcing the above-mentioned contract fixing the damages and involving the question of the right of the trial court to entertain "**jurisdiction**" in the same suit where the Government brings a proceeding is of great public importance. We think that the decisions of this Court clearly establish the jurisdiction of the trial court to do justice between the parties and decide all issues involved in the transaction or connected with the subject matter, when the Government has filed a proceeding involving the same. But it is obvious that there is some confusion in the courts of appeal, and we feel that the Court of Appeals in the case at bar has wholly misconstrued the decisions of this Court, as we have pointed out, when the Court of Appeals held that the rule of this Court governing these cases is **only** applicable to **admiralty** cases. As we view it, the Wachovia case, cited supra, is in conflict with the case at bar, and the opinion of the Court of Appeals militates against the principle announced by this Court as set out above.

We earnestly urge upon the Court to grant the writ and to settle the two questions involved and reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX.

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project; is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project

and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

Sec. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately \$292,000,000, heretofore made by the local interests in the alluvial

valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks

of the river; it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

Sec. 8. The project herein authorized shall be prose-

cut by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be \$10,000 per annum, and the salary of the other members of the commission shall hereafter be \$7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

Sec. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

EXHIBIT A.

In the United States District Court
Eastern District of Missouri
Southeastern Division.

United States of America,

Plaintiff,

vs.

William H. Danforth, et al.,

Defendants.

No. 423.

FINDINGS AND FINAL JUDGMENT.

Now on this, the 6th day of December, 1930, comes the above named plaintiff, the United States of America, through and by its attorneys, Louis H. Breuer, Esquire, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and John C. Dyott, Esquire, Special Assistant to the aforesaid district attorney, and moves the Court for final order in said cause, and the Court being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, and the evidence submitted by the respective parties or such of them as appear, doth find and adjudge and decree in the manner following, to-wit:

The Court find that the United States of America is plaintiff, and that the following are defendants:

William H. Danforth: Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Mo., to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in

the above mentioned deed of trust; Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Mo., to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in the above mentioned deed of trust; Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in the above mentioned deed of trust; W. W. Norman, Anniston, Missouri, renter; S. H. Graham, Route 2, East Prairie, Missouri, renter; Alvin Estes, Route 2, East Prairie, Missouri, renter; Levee District No. 1, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of Levee District No. 1 in the aggregate sum of \$153,000.00, designated as Series D and Series E, and maturing annually from 1929 to 1928 inclusive, and as further described in the petition; Drainage District No. 23, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of Drainage District No. 23 in the sum of \$1,000.00 each, Nos. 110 to 240 inclusive, and maturing annually from 1924 to 1931 inclusive, and as further described in the petition; St. John Levee & Drainage District, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of St. John Levee & Drainage District in the aggregate sum of \$1,117,000.00, as represented by ten issues, one to ten inclusive, and as further described in the petition.

The Court finds that this proceeding was instituted by the plaintiff in the way and manner as by statute in such case made and provided; that said petition sets forth a

complete cause of action in condemnation of certain real estate for public use, as provided by and in conformity with, and authorized by the act of Congress of May 15, 1928, and known and designated as the Flood Control Act;

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided.

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with all necessary writs and notices required by law; and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the taking of the premises described, for public use as in said petition set forth; and that the said Court did in accordance with said notice, upon the 24th day of April, 1930, appoint three viewers, to-wit: E. P. Deal, J. C. Stewart and E. C. Davis, to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned by the Court to them, and by the law in such case made and provided, did take and subscribe to the required oath;

that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 13th day of June, 1930, in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of their said report by said viewers, and that the defendant, William H. Danforth did, on the 5th day of July, 1930, and within the time, and in the way and manner prescribed by law, duly except to the report of said viewers as to the matters therein contained; and that so-called exceptions were filed by certain levee and drainage districts named in the caption of the said petition, and it further appearing that said exceptions were not sufficient in form to constitute a valid reason why the said viewers' report should not be confirmed, and that upon the 6th day of December, 1930, the attorneys for the plaintiff filed a motion with this Court asking for dismissal of the exceptions of the said levee and drainage districts, and the matter being taken up instanter by the said Court, the Court being fully advised in the premises did dismiss and strike from the records, without prejudice, the aforesaid exceptions; and that the other defendants named in said petition did fail to file any exceptions, and that said defendants so failing are hereafter barred from so doing, or voicing objections thereto;

The Court doth further find that on the 6th day of December, 1930, upon due notice to all parties, said cause came on to be heard on the exceptions filed by the defendant William H. Danforth, and that parties hereto

waived the right of a trial by jury, and the issues were by agreement submitted to the Court sitting in lieu of the jury; and being fully advised in the premises, and upon evidence submitted by both the plaintiff and defendant, the Court did find the issues in the manner following:

That the plaintiff herein is entitled to a judgment in condemnation, and the defendants herein, in solido, are entitled to damages in the sum of \$17,000.00, being the full amount to which the said defendants are entitled, for the land taken for the set-back levee right of way, and the damages caused thereby to the remainder of the said property;

And it further appearing that pursuant to court order made and entered, the plaintiff herein did on or about the 27th day of January, 1930, deposit within the registry of this court the sum of (\$7900.50) to apply upon such sum as might be found due and owing the defendants herein for the premises sought to be condemned and as hereinafter described; and the plaintiff did thereupon under authority of the statutes of the United States, and further upon order of this Court, take possession of said premises, and that the said plaintiff is now lawfully and legally in possession thereof, for the purposes for which said action in condemnation was brought;

And it further appearing to the Court that the defendants are entitled to a total of \$17,000.00 for damages, the Court doth further find that the plaintiff herein is required and ordered to deposit within the registry of this court the additional sum of \$9099.50, in order to secure title to said property; and the Court doth further find that the premises needed and required by the plaintiff, and which said premises this plaintiff seeks to condemn, and which said premises were viewed by said commissioners or view-

ers, and which are included in the report thereof, are bounded, defined and described as follows:

A parcel of land lying wholly within the west half of Section 22 and the west half of Section 27, all in T. 25 N., R. 16 E., of the 5th principal meridian, Mississippi County, Mo., as shown on the above plat, and being more particularly described as follows: Beginning at a point "A", the said point "A" being on the line between the said section 22 and the said section 27, and being North $89^{\circ} 27'$ East, 151.4 feet from the northwest corner of the said section 27; thence North $19^{\circ} 47'$ East, 1228.7 feet to point "B"; thence North $70^{\circ} 13'$ West, 25.0 feet to point "C"; thence North $19^{\circ} 47'$ East, 1200.0 feet to point "D"; thence South $70^{\circ} 13'$ East, 20.0 feet to point "E"; thence North $19^{\circ} 47'$ East, 329.7 feet to point "F"; thence North $12^{\circ} 01'$ East, 2756.5 feet to point "G", the said point "G" being on the north line of the said section 22; thence South $89^{\circ} 41\frac{1}{2}'$ East, 439.1 feet along the said north line of the said section 22 to point "H"; thence South $12^{\circ} 01'$ West, 3663.4 feet to point "I"; thence South $19^{\circ} 47'$ West, 1188.5 feet to point "J"; thence North $70^{\circ} 13'$ West, 145.0 feet to point "K"; thence South $19^{\circ} 47'$ West, 686.0 feet to point "L", the said point "L" being on the said line between the said section 22 and the said section 27, and being North $89^{\circ} 27'$ East, 562.0 feet from the northwest corner of the said section 27; thence South $19^{\circ} 47'$ West, 446.7 feet to point "M"; thence South $0^{\circ} 00\frac{1}{2}'$ West, 2269.3 feet to point "N"; thence South $89^{\circ} 44\frac{1}{2}'$ East, 20.0 feet to point "O"; thence South $0^{\circ} 15\frac{1}{2}'$ West, 1907.9 feet to point "P"; thence South $89^{\circ} 44\frac{1}{2}'$ East, 65.0 feet to point "Q"; thence South $0^{\circ} 15\frac{1}{2}'$ West, 675.8 feet to point "R"; the said point "R" being on the north line of concrete highway right of way; thence North $89^{\circ} 38\frac{1}{2}'$ West, 256.3 feet along the said north right of way line of the said highway to point "S", the said point "S" being the point of beginning of a $32^{\circ} 15'$ curve to the right, which has a radius of

180 feet and central angle of $90^{\circ} 07'$; thence 279.4 feet along the said curve on the said highway right of way line to point "T", the said point "T" being on the end of the said curve on the said highway right of way line; thence North $0^{\circ} 09\frac{1}{3}'$ East, 4721.7 feet along the east line of the said highway right of way line to point "U"; thence North $19^{\circ} 47'$ East, 356.1 feet, more or less, to point of beginning; the said parcel containing 105.34 acres, more or less, subject to easements or rights of way, as shown on aforesaid plat, of .38 acres, more or less, for public road across center of parcel and 2.7 acres, more or less, for drainage ditch. The bearings of boundaries in this description are referred to true North.

The Court doth further find that all of the above described premises are needed and required by the plaintiff in the completion of the project as provided for by the act of Congress of May 15, 1928, Chapter 569;

Now therefore, it is ordered, adjudged and decreed that the plaintiff-condemnor in this said proceeding, to-wit, the United States of America, by virtue of this proceeding, shall have judgment in condemnation against the premises described in the said petition, and the defendants herein, and that the title in fee simple to said premises heretofore described shall without reservation vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, title, interest and claim thereunder, of any name or nature, and that the said premises and the title thereto and the possession thereof shall be and the same are hereby vested in the United States of America and its assigns forever; and it is further ordered that the said United States of America, its servants and agents, for and in consideration of the foregoing premises, shall pay into the registry of this court the sum of \$9099.50, for the use and benefit of the said defendants

named in said petition, and any and all other persons who may be found entitled thereto, in the way and manner and in proportion as this court shall hereafter order, adjudge and decree.

C. B. Faris,

U. S. District Judge.

Dated this, the 6th day of December, 1930.

Endorsed: Filed December 6th, 1930. Jas. J. O'Connor,
Clerk.

United States of America,
Eastern District of Missouri, } ss.
Southeastern Division.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Findings and Final Judgment as filed and entered in said Court on the 6th day of December, 1930, in cause No. 423, wherein the United States of America is plaintiff and William H. Danforth, et al., are defendants, and I do further certify that the petition in condemnation in the aforementioned cause was filed in said Court on the 16th day of January, 1930, now remaining among the records of the said Court in my office.

In Testimony. Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cape Girardeau, Mo., this 7th day of August, A. D. 1939.

Jas. J. O'Connor,

Clerk,

By James M. Arnold,

Deputy Clerk:

(Seal)

No. 309.

Office - Supreme Court, U. S.
FILED
OCT 16 1939
CHARLES E. MORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

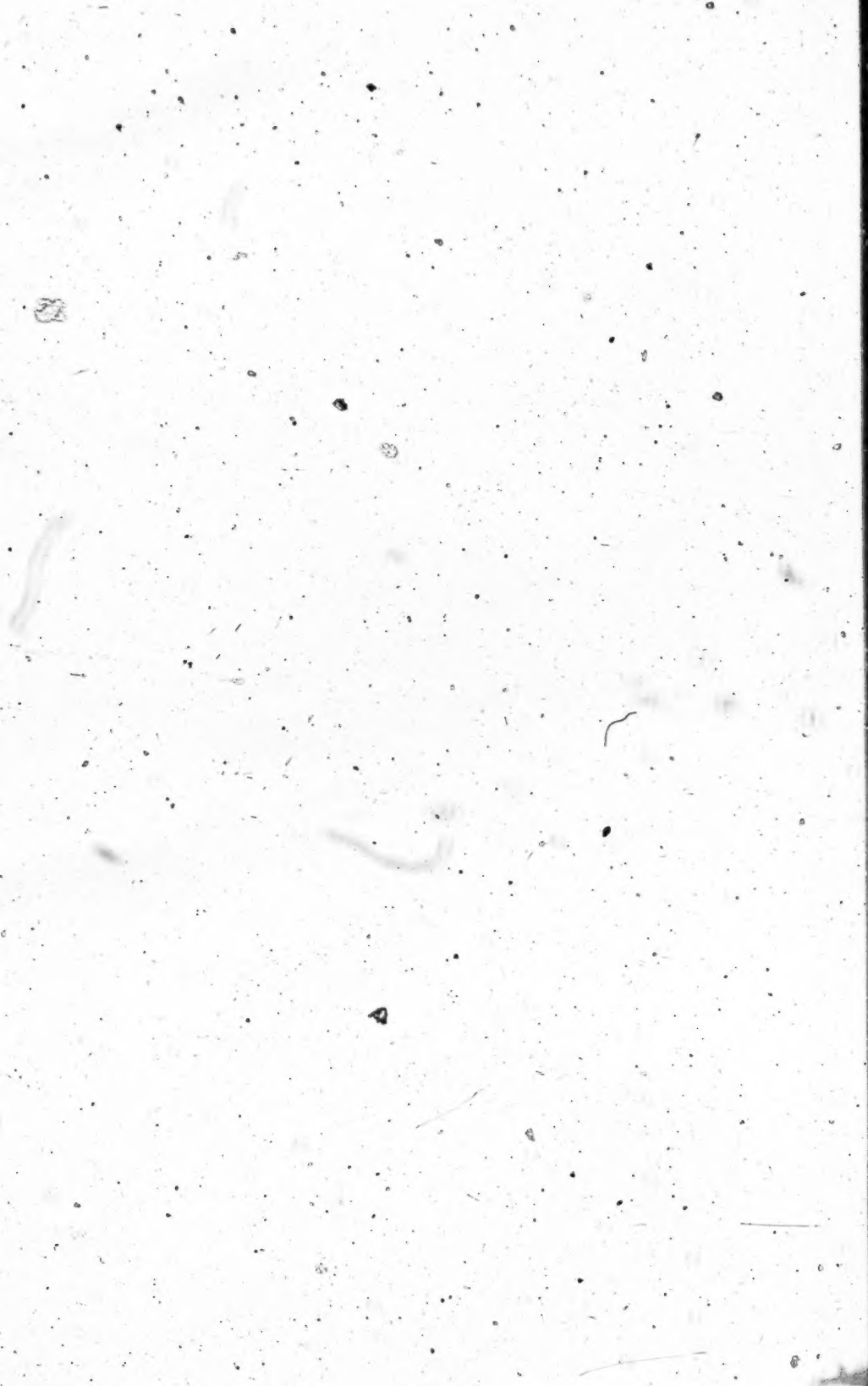
On a Writ of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

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St. Louis, Missouri,
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No. 309.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The District Court decision is not reported. The first opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. pp. 221-229) is reported in 102 Fed. (2nd) 5. The second opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. pp. 233-239) is reported in 105 Fed. (2nd) 318.

JURISDICTION.

The statutory provisions upon which the jurisdiction of this Court rests is Section 240 (a) of the Judicial Code, as amended February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accum. Supp. 1925, 28 U. S. C. A. 347.

The date of the judgment to be reviewed is July 11, 1939.

QUESTIONS INVOLVED.

The two questions involved are:

1.

Did the Government "appropriate or take" an easement in the land in question within the meaning of the Fifth Amendment, either

a) When it started to work on the set-back levee on October 21, 1929, or

b) On October 31, 1932, when the set-back levee was completed, or

c) When Congress passed the Flood Control Act May 15, 1928 (33 U. S. C. A., par. 702a, et seq.), and adopted a plan of flood control, which involves an intentional, additional, occasional flooding of complainant's land as soon as the Government began to carry out the project authorized?

2.

Does the rule of law announced by this Court in a number of cases to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter, apply only as held by the Court of Appeals to admiralty cases (R. p. 227), or does the rule apply also to law cases?

a. Can the United States repudiate an admittedly valid contract duly and lawfully entered into, fixing the value of an easement or the damages occasioned by the Floodway Act project, then bring condemnation proceedings and claim sovereign immunity when the said contract is asserted in the condemnation suit as the agreed measure of damages?

The facts showing jurisdiction are hereinafter set out under the heading **Statement** (p. 4). In the interest of brevity they are not repeated here.

The decision of the Court of Appeals holding that there has been no "taking" or "appropriation" is set out (R. p. 239). The first decision of the Court of Appeals holding that there **was** a "taking," but that the trial court had no jurisdiction to fix the amount of damages, in accordance with the contract of the parties, is set out (R. pp. 227, 228). The Floodway Act of May 15, 1928, which petitioner contends is violated by the opinion of the Court of Appeals is referred to (R. pp. 4-5), as set out in respondent's petition in condemnation. The applicable parts of the said Floodway Control Act are set out in the appendix.

The following decisions sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the two questions involved, for the reasons set out in the specifications of error, hereinafter set forth.

A.

On question of "taking."

Hurley v. Kincaid, 285 U. S. 95;

Jacobs v. U. S., 290 U. S. 13;

U. S. v. Lynah, 188 U. S. 445;

Pumpelly v. Canal Co., 80 U. S. 166;

U. S. v. Cress, 243 U. S. 316;

U. S. et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5);

MICRO CARD

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U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366 (reversed on stipulation, 67 Fed. [2nd] 1019);
Sponenbarger v. U. S., 101 Fed. (2nd) 506 (C. C. A. 8) (now pending in this court on certiorari);
Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6) (now pending before this Court on certiorari).

B.

On the question of the jurisdiction of the trial court to enter judgment or fix the damages as per contract of the parties.

Luekenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328;

Bull v. U. S., 295 U. S. 247;

The Nuestra Senors de Regla, 108 U. S. 92;

The Paquete Habana, 189 U. S. 453;

U. S. v. Stephanidis et al., 41 Fed. (2nd) 958), aff. 47 Fed. (2nd) 554 (C. C. A. 2);

Wachovia Bank & Trust Co., Giaridan etc. v. United States (decided Aug. 26, 1938, by United States Circuit Court of Appeals, Fourth Circuit), 98 Fed. (2nd) 609 (C. C. A. 4);

U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2nd) 898 (C. C. A. 2);

U. S. v. Nat. City Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

STATUTES INVOLVED.

The relevant portions of the statutes involved are set out in the Appendix, infra (pp. 55-59).

STATEMENT.

This is a suit brought by the United States to obtain an easement for flowage rights over the petitioner's farm, consisting of 1,033.56 acres in Mississippi County, Mis-

souri, pursuant to the Floodway Act of May 15, 1928 (R. p. 4).

The Government, pursuant to the said act, and as part of the project, had **previously** condemned and taken 105.34 acres extending along the whole western side of this farm (Exhibit A—heretofore attached to the petition for writ of certiorari, filed in this court August 23, 1939), and used the same as part of the inside or set-back levee (R. p. 237), which was built from Birds Point in a general southwestern direction to New Madrid.

This set-back levee was begun October 21, ¹⁹²⁹~~1939~~, and was 98.9 per cent completed on October 31, 1932. For all practical purposes the set-back levee was completed on October 31, 1932 (R. p. 196). Since that time the only work done was to replace slides (R. p. 196).

We do not think it necessary to set out more than a very brief statement of the engineering testimony showing the purpose of the Floodway Act, but the same is set out in the testimony of the Government's engineer, T. T. Knappen (R. pp. 109-112), and the testimony of L. T. Berthe, an engineer who testified for the petitioner (R. pp. 189-193). At the time the record in this case was prepared there was serious doubt in the minds of both counsel for the petitioner and counsel for the Government as to whether any engineering testimony was essential to the issues on appeal, and the engineering testimony was very much abridged in the record for this reason.

In brief, it shows that under the Floodway Control Act in question a plan was devised by the Government engineers, which plan was adopted by Congress, whereby in times of excessive floods the water would be permitted to flow over the riverside levee along a place called the fuse plug and would leave the spillway area at the lower end of the project, but the water would be restrained from flowing west beyond a point where there is the set-back

levee (R. p. 110), and which follows a line extending from Birds Point in a generally southwesterly direction to a point on the west bank of St. John's Bayou across from New Madrid. The said riverside levee was constructed to an elevation varying from about 57 to 59 feet. At Cairo there is a gauge, which is a concrete slab on the riverbank, with the elevation written on an iron plate in that slab, so that one can read the elevation of the water surface in terms of zero on that gauge. When one says that the riverside levee which follows the contour of the Mississippi River down to a point near New Madrid is between 57 and 59 feet, he means that the criterion is the Cairo gauge. In one of these it would be two feet higher than 55 feet, and the other 4 feet, so that the equivalent of 55 feet on the Cairo gauge means that a flood crest that reaches 55 feet at Cairo, as it follows down the river, is equivalent to 55, the height which that flood crest reaches as it passes on down the river, not necessarily the height of the water down below when it is 55 on the Cairo gauge, but the height the water would be on its course when the same maximum reached 55 feet at Cairo. From time to time the Riverside Levee has been increased in height up to the adoption of the Flood Control Act of 1928 (R. pp. 189, 190).

The gauge is marked in feet and tenths, so that the surface of the water where it intercepts against the gauge gives the stage. It is located about two miles up the Ohio River from the mouth of the Ohio River. The gauge is separate from the height of the Riverside Levee, and the height of it is actually the height of the river above the ground surface, so that 55 feet on the Cairo gauge has nothing to do with the height of the Riverside Levee. It has to do with the height of the water along the Riverside Levee; or against it when the water stands at a given height on the gauge at Cairo as it passes. From an engi-

neer's point of view, it would be possible to construct a river levee that would protect the lands against floods, if Cairo were disregarded (R. p. 189). The levee could be raised to where it would protect up to 65 feet on the Cairo gauge and would be practical except for the fact that the City of Cairo would be inundated (R. p. 190). The levee, however, has not been raised or touched, or maintained by the levee companies since 1927 or 1928 (R. p. 190). The effect of the set-back levee, which, as we have shown, was started in 1929 and completed in 1932, is to increase the depth velocity and duration of the overflow over and above what the depth and velocity and duration of the overflow would be without the set-back levee in there. If the set-back levee were absent, some of the water would pass to the west and some to the southwest (R. p. 190). In the flood of 1937 the depth of the water was increased by the set-back levee by five to six feet. The increase in depth and velocity of flow results in increased damage from wave action, primarily to buildings. With ordinary high water maintenance, none of the floods would have passed over the levee between 55 and 59 feet, except the flood of 1913 and the flood of 1937. With extraordinary maintenance, such as was put on the set-back levee in 1937, none of them would have overtopped except the flood of 1937. During the flood of 1937, because of the set-back levee, in restricting and preventing the flow of floodwaters to the west, there were additional flood waters diverted from the Mississippi and caused to flow over and across the petitioner's farm to an increased depth of about five or six feet. It was this increased depth, by reason of the set-back levee, that the Court of Appeals held was not an element of damage, and was not within the purview of the additional destructive waters that are set out in the Flood Control Act (R. p. 237). It would be possible to build the Riverside Levee up to 65 feet on the Cairo gauge, and then it would be possible to fill or raise the City of Cairo

(R. p. 191). There are several elements that govern the depth of the water. The accumulation of water is what is known as a reservoir. There is the element of a quantity of water to be passed through, the point of origin, the character of the cross-section, whether it is clear or timber, and the head at which it enters, the direction of flow (R. p. 192).

There is also a mean gulf level, by which term is meant so many feet above the mean sea level at Biloxi, Mississippi. Zero on the Cairo gauge is at elevation $270\frac{1}{2}$ mean gulf level. The effective protection which the riverside levee affords is from 57 to $59\frac{1}{2}$ feet (R. p. 110).

There is another element that is to be considered in connection with lands along the Mississippi River, which is very important in arriving at the element of damages, and that is the question of backwater or water that accumulates on the lands. Lands that are above 300 feet elevation are above the backwater territory and are not affected by the backwater (R. p. 111). The lands in question, as shown by the testimony of a Government engineer, G. W. Miller, shows that the tract consisting of 1,033.56 acres comprises all of Sections 22 and 27 lying east of the setback levee. Of this tract only 27.7 acres, or 2.8 per cent, lies below elevation 300. Of the whole tract 995.65 acres is above backwater, that is, above 300 feet elevation. The average elevation is 304.3 (R. p. 189).

By the project in question it was proposed to reduce the effect of the elevation of the upper eleven miles of the levee, with the exception of one mile at what is known as the Peafield Sewer, from its elevation, which was equivalent to 55 on the Cairo gauge. This was to be done by cutting the top of the levee off from 15 feet to a lower height of 12 or 13 feet. The same would be done for the lower five miles, for the purpose there of permitting any water above 55 to pass freely over the top of the levee at that end.

There was other engineering testimony (R. p. 189), showing that the actual height of the riverside levee varied from 10 to 20 feet, and at some places was as high as 25 feet.

The Floodway Control Act provides, among other things (Sec. 702D):

“ * * * When the owner of any land, easement or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price. * * * ”

The act in question refers to the engineering plan submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, First Session, and authorizes the project to be prosecuted under the **direction** of the **Secretary of War** and the supervision of the **Chief of Engineers**. Pursuant to authority under the act of **Section 1** of the same **the President** of the United States approved the Board provided for in the act, and reserved the right to make provisions for acquiring rights in land for constructing spillways and floodways. Accordingly, on December 11, 1928, he issued a presidential proclamation in connection with acquiring flowage rights, in which proclamation he provided for the purchase of flowage rights over the land within the floodway, between the existing riverside levee and the back (westward) levee, and in which he provided “that in no case shall the purchase price for the flowage on the land above the backwater area in the southern part of the floodway be more **than 66 per cent** of the present assessed valuation of this land” (R. p. 193): (Emphasis ours.) This proclamation is set out (R. pp. 193-194).

Pursuant to the said law and the said presidential proclamation, and **within the said 66 per cent** of the then

assessed value (R. p. 195), the Secretary of War, through military channels, offered the petitioner the sum of \$31,681.98 for flowage rights over the above mentioned tract of land (R. p. 164). This was duly accepted by petitioner within the time authorized by the Government (R. p. 170, Exhibit K). Prior to the time that the said offer of \$31,681.98 was made, the Government had had three appraisals made, one by the Department of Agriculture, one by army engineers, and one by local men (R. p. 160). Several months after the acceptance of the Government's offer by petitioner, the Government, through the same military officer, Major Brehon Somervell, wrote to petitioner withdrawing the said proposition (R. p. 185). The offer and acceptance were couched in the following language:

“War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer of flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand

six hundred eighty-one and 98/100 Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incls.

Tract map;
General map of floodway;
Addressed return envelope.

Accepted: Wm. H. Danforth,
(Owner)
c/o Purina Mills,
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

Following its repndiation of the agreement fixing the damages, the Government filed a condemnation suit on September 25, 1933, for the flowage rights over the said tract of land (R. p. 4). The petitioner filed an answer and

counterclaim in said suit, setting out the written offer of the Government and the petitioner's acceptance of the same within the time authorized by the Government (R. p. 21). The said pleadings also denied the allegations in the Government's petition that the parties were unable to agree upon the amount of flowage damage (R. p. 22). The said pleadings also set out that the actual damages were in excess of \$31,681.98, but that the said sum was accepted as a compromise and settlement, and that the parties had by contract fixed that sum for the flowage easements (R. p. 21). The counterclaim prayed for judgment against the Government in the sum of \$31,681.98 with interest, and further prayed that the Court decree an easement in favor of the Government for the perpetual flowage easement (R. p. 25).

The allegations of the answer and counterclaim were conclusively proven through depositions taken of ex-Secretary of War, Patrick J. Hurley, Major-General Edward M. Markham, Chief of Engineers, and Major Brehon Somervell, the officer in charge at Memphis, who was ordered by the Secretary of War to make the offer aforesaid (R. pp. 116-128). Although the said answer and counterclaim were duly filed, by leave of Court (R. p. 20), upon motion of the Government, the Court struck the same out upon the theory that a counterclaim could not be filed in the case because, as the Court stated, the Government, even when acting through its appointed authorities, could not agree to limit the jurisdiction of the Court (R. p. 40), saying: "By telling this Court, in other words, that I shall be friendly when I have no authority to be friendly when the law in this case shows it is my duty to be unfriendly when I am passing on that motion to strike." (The reference is to the phraseology of the contract.)

At every step this petitioner claimed that the agreement in question fixing the damages or value of the flowage

rights was binding, and after the Court struck out the said answer and counterclaim, raised the same issue in exceptions filed to the viewers' report (R. pp. 57 and 68), and also filed a motion for judgment setting out the same facts set out in the answer and counterclaim (R. p. 41).

The Court ruled adversely to this petitioner, one District Judge ruling that an answer and counterclaim would not lie (R. p. 40), the successor holding that an answer should have been filed (R. p. 49), overlooking the fact that same had been stricken from the record by the first trial judge. The Court, over petitioner's objection and exceptions, appointed viewers, and affirmed an award of \$17,921.70, after overruling the motion of the petitioner for judgment in the sum of \$31,681.98 (R. p. 78).

Neither of the said trial judges gave any reason for refusing to enforce the contract in question, filed no opinions regarding the same, simply denied the petitioner, Danforth, the relief requested in the various forms as set out above to enforce the contract in question.

So that the petitioner raised the issue that he was entitled to recover the sum of \$31,681.98 and interest, in three different ways: First, by pleading the answer and counterclaim; second, by filing exceptions, raising the same issue, and, third, by filing motions to set aside the awards and for judgment. As we have set out above, the Court struck out the answer and counterclaim, held that the issue could not be raised in exceptions, and overruled the motion to set aside the award and judgment and to enter up a judgment for the said sum and interest, to all of which the petitioner duly excepted.

The record shows that in those cases where the Government desired to carry out similar offers which were made to the landowners, they appeared before the Court and entered up judgments (R. p. 187) in accordance with the identical terms, of similar offers as that shown in the case at bar (R. p. 43).

Lieutenant-Colonel Eugene Reybold of the Corps of Engineers, U. S. Army, stationed at Memphis, Tennessee, had charge of the district in question in January, 1937. At that time he issued instructions to dynamite the levee during a flood in January of 1937, or as the Colonel testified, "he placed the Birds Point-New Madrid Floodway in operation" (R. p. 199). Major R. D. Burdick also testified that he was authorized and directed to open the fuse plug section of the levee to place the said project in operation in January, 1937 (R. p. 201).⁶

The evidence showed that just prior to the time of the Floodway Act in 1928 the Northwestern Mutual Life Insurance Company was lending money on a basis of \$50.00 an acre in the area where this land was located; that they did not make any loans since the Floodway Act went into effect in areas within the spillway, although they had applications for them (R. p. 187).

Deeds of trust aggregating \$48,000 on the property in question were paid off in full to the Northwestern Mutual Life Insurance Company prior to the last hearing in the trial court, so that petitioner is the only one who has any interest in the land (R. p. 89).

The trial court refused to allow **interest** on the said award of \$17,921.70, holding that there has been no "taking."

This case was argued twice before the Court of Appeals. In the first opinion of March 4, 1939, reported 102 Fed. (2nd) 5, the Court of Appeals modified the judgment of the trial court to the extent of holding that there was a "**taking**" as of October 21, 1929, and allowed interest as of that date, but held that while the contract between the Government and this petitioner fixing the damages was **valid** and **binding** and could be enforced by the Government, it could not be enforced by the landowner in the District Court in the suit at bar (R. pp. 224-225). On motion for **rehearing**, filed by the **Government**, the Court of Ap-

peals set aside the judgment which it had entered, and set the case down for rehearing on May 12, 1939, limiting the argument only to the question of **when** there was a **taking** (R. p. 232). Under date of July 11, 1939, the Court of Appeals affirmed the judgment of the trial court, reversing itself on the question "of taking," and holding that the property in question has not yet been taken (105 Fed. [2nd] 318), although the same court, under date of February 8, 1939, in the case of **Sponenbarger et al. v. United States**, 101 Fed. (2nd) 506, a suit coming up from the District Court for the Eastern District of Arkansas under the same Act of May 15, 1928, under similar facts, held that there was a "taking." This Court has recently granted certiorari in the Sponenbarger case. There is also now pending before this Court on certiorari the case of **Franklin et al. v. United States**, 101 Fed. (2nd) 459, involving the question of a "taking" and arising under the same Flood Control Act of May 15, 1928, coming up from the Sixth Circuit. In the Franklin case the Court of Appeals for the Sixth Circuit held there was no taking or appropriation, with Circuit Judge Hamilton dissenting.

SPECIFICATIONS OF ERRORS TO BE URGED.

I.

On Question of Taking.

The Circuit Court of Appeals for the Eighth Circuit erred in the following particulars, to wit:

(1) In holding that the building of the set-back levee was only one essential element in the Jadwin Plan, and that there can be no taking until the height of the upper fuse plug section is reduced about three feet for a distance of eleven miles below Bird's Point, Missouri, and for a distance of about five miles from New Madrid, Missouri (R. p. 236).

(2) In holding that petitioner still enjoys the same use of his land that he always has, although the Government has condemned and taken possession of 105.34 acres along the western part of the farm in question as part of the set-back levee pursuant to the said Floodway Act, and in holding that increasing the depth of water over appellant's land artificially through the building of the set-back levee does not increase the damage to plaintiff's property (R. pp. 237-238).

(3) In holding that the increased depth of water to which appellant's lands are subjected are not the "additional destructive flood waters" referred to in the Act of May 15, 1928, and erred in holding that the increased depth of the water is an incidental consequence for which the Government cannot be held liable (R. p. 237).

(4) In holding that the military officers in charge of the floodway area had no authority to dynamite the existing river levee prior to the completion of the fuse plug section (R. p. 238).

(5) In holding that there is nothing in the Flood Control Act to prevent the raising of the levees by the existing local levee district prior to the construction of the fuse plug sections (R. p. 239).

(6) In holding that the Government had not assumed dominion over the river side levee, although after the flood of 1937 the Government first ordered it to be rebuilt to fifty-five feet and then changed the plan and ordered it built to fifty-eight feet (R. pp. 200, 239).

(7) In holding (R. p. 239) that "appellant's land will not be taken within the meaning of the Act, until the upper fuse plug in the riverside levee shall be opened and the land is exposed to 'additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River.'"

II.

On Question of Jurisdiction of the Trial Court to Enforce Contract or Enter Judgment.

(8) In holding that the District Court had no jurisdiction to hear petitioner's claim or to enter a judgment in the condemnation proceeding upon an admittedly valid contract fixing the extent of the damages for the flowage rights then being taken by court proceedings.

(9) In holding that the rule announced by the Supreme Court to the effect that when the United States comes into court to enforce a claim, it comes not as a sovereign, but as a suitor, and thereby submits to the Court's jurisdiction of just claims relating to the subject matter involved, even to the extent of becoming subject to an affirmative judgment, **is limited to suits in admiralty.**

(10) In holding that there is a difference between suits brought by the United States in condemnation proceedings and in other proceedings so far as the character in which the Government brings the suit.

(11) In holding that there is a difference between asserting a claim in opposition to a money demand brought by the Government and to a demand brought by the Government for flowage rights over plaintiff's property.

SUMMARY OF ARGUMENT.

A.

QUESTION OF TAKING.

The petitioner claims that there was a "taking" or "appropriation," either when the set-back levee was started October 21, 1929, or at any rate when it was completed October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of Flood control.

The decision of the Court of Appeals violates the Flood Control Act itself (which is set out in the Appendix, p. 55), particularly sections 3 and 4, providing for procedure on the part of the United States to acquire flowage rights and providing for the purchase of such flowage rights by the Secretary of War, when in his opinion he deems the price reasonable. The decisions supporting the petitioner's contention that there was a taking or appropriation are set out herein under the heading of **Jurisdiction** on the question of taking (p. 4). The opinion in the case at bar is in direct conflict with the said cases cited under subdivision A.

The Government admitted in the Court of Appeals, and we are confident the Government will also admit in this Court, that the petitioner is entitled to interest from the time of taking. It is only the time of taking that the Government disputes. The cases relied on by the Government to support its position that there has been no taking are without application. Assuming that most or all of such cases will be the ones heretofore relied on by the Government, we shall briefly discuss some of them in the main argument to show their inapplicability.

B.

ON THE QUESTION OF THE JURISDICTION OF THE TRIAL COURT TO HEAR THE CLAIM OR ENTER JUDGMENT FOR THE AMOUNT AGREED UPON BY THE GOVERNMENT AND THIS PETITIONER AS THE EXTENT OF DAMAGES OR AS THE VALUE OF THE FLOWAGE RIGHTS.

1.

When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

U. S. v. The Thekla, 266 U. S. 328, 1: c. 339.

2.

The Government and the landowner had a right to agree upon compensation for the flowage rights or the damages, and the contract duly entered into by the petitioner and the United States of America, through its duly authorized agent, is valid and binding. Indeed, it is authorized by the Flood Control Act of May 15, 1928, and is recognized as valid and binding by the Court of Appeals in its opinion (R. p. 224), where the Court says:

"In this appeal the appellant continues to urge that he was entitled to have his damages determined under the prior agreement with the Government and that the lower court was in error in appointing commissioners to make an assessment based upon actual values. On its part the Government admits that a valid and binding contract to purchase the flowage easement involved for \$31,681.98 was entered into with the appellant and subsequently repudiated. It contends, however, that sovereign immunity from suit de-

prived the trial court of jurisdiction to render an affirmative judgment on a contract claim of this amount."

The Government, in its brief filed in the Court of Appeals, admitted the validity of the contract, saying:

"It may be true that to attain complete justice in one proceeding the appellant should be allowed in the District Court recovery on the contract to which he may be entitled, especially since the United States could, had it chosen to do so, have enforced it in that forum against him. But, however desirable this might be, the statutes which alone can confer jurisdiction over suits against the United States and the decisions thereunder plainly show that the court below had no jurisdiction of appellant's claim."

The Government further said in its brief (p. 26):

"The Government, as in the Wachovia Bank case, may plead the contract, in which case all parties thereto are bound, or it may take the property on payment of just compensation, in which case the contract may not be asserted in the condemnation proceedings as a basis for recovery against the Government."

"If this entails hardship, it is a hardship incidental to contractual relations with the Government."

The case of Wachovia Bank & Trust Co., Guardian, etc., v. U. S., 98 Fed. (2nd) 609, decided August 26, 1928, by the United States Court of Appeals for the Fourth Circuit, also upholds this petitioner's contention that the contract in question is enforceable against the United States in this proceeding.

3.

The Court erred in striking out the answer and counterclaim.

The striking out of the same was not merely procedural.

It involved a substantial right. *Fuller v. Clafin*, 93 U. S. 14; *In re Glória*, 286 Fed. 188. And the Court of Appeals, in upholding the action of the trial court and in holding that the trial court had no jurisdiction to hear the claim or to enter a judgment in accordance with the contract of the parties, violated the principle of law repeatedly declared by this Court to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done in regard to the subject matter. This Court has never held, as contended by the Court of Appeals in its opinion, that this rule of law is limited to admiralty cases. A condemnation suit is a law case, and the rule contended for is applicable (*Chappell v. U. S.*, 160 U. S. 499, l. c. 513). Therefore, when the United States brought the suit in question the petitioner had a legal right to assert the contract in question and the Court should have recognized the contract and entered up a judgment in accordance with the terms which involved the same subject matter and grew out of the same transaction, namely, the acquiring of the flowage rights over the land in question. The cases upholding this rule will be discussed under the argument.

ARGUMENT.

A.

QUESTION OF TAKING.

Petitioner claims that there was a "taking" or "appropriation," either when the set-back levee was started October 21, 1929, or at any rate when it was completed October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of flood control.

The record shows that the set-back levee was started by the Government on October 21, 1929. It was 98.9 per cent completed on October 31, 1932 (R. p. 195). There was a gap to close at a town called Samos, because the Government had not acquired a right of way where the Missouri Pacific crosses that levee.

The only work that was done since October 31, 1932, was the replacement of slides and repair operations (R. p. 196). Certainly when the United States exercised dominion over the property of the defendant there was a taking within the meaning of the Constitution. We have always felt, and we now feel, that if there was not a taking when Congress enacted the legislation and provided for a definite plan of Flood Control, there was certainly a taking when the work was commenced on October 21, 1929, and interest should be chargeable as of that time. This was the first holding of the Court of Appeals (R. p. 229). The Court of Appeals for the Eighth Circuit, in the case of *Sponenbarger v. U. S.*, 101 Fed. (2nd) 506, in construing the Floodway Control Act of May 15, 1928, held:

1. "Without question, in the passage of this Act, Congress has assumed control of this fuse plug, and, by

entering a field within its jurisdiction, has excluded all local interference with its national powers. . . .

In fact, the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection."

2. That the Floodway Act was one plan and when the Government began to carry it out that there was a taking.

3. That by the provisions of the plan the flood control is subjected to a planned and practically certain overflow in case of the major floods contemplated and described.

4. That

"So considered, a reasonable construction of Section 4 of the Act of May 15, 1928 (33 U. S. C. A., Sec. 702-d), must regard such as the 'additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River,' for which the United States shall provide flowage rights (Section 4, Act May 15, 1928)."

The Court of Appeals in the Sponenbarger case quotes with approval from one of the briefs of counsel as follows:

"The Government has deprived the Boeuf Basin landowners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice

the existing levees when necessary to accomplish the general purpose.' ”

In the case of *Hurley v. Kincaid*, 285 U. S. 95, this Court said:

“We may assume that, as charged, the mere adoption by Congress of the Plan of Floodway Control, which involves an intentional, additional, occasional flooding of complainant's land, constitutes a taking of it . . . as soon as the Government undertakes to carry out the contract authorized.”

In the case of *United States v. Yazoo etc. R. Co.*, 4 Fed. Supp. 366, decided by the District Court of Louisiana, Borah, District Judge, the condemnation proceedings were instituted under the same act. Commissioners were appointed and instructed as to their duties. They returned an award for more than one million dollars, to which the Government filed exceptions and objections. Arguments were heard on the exceptions and the case was submitted. Thereafter the Government, claiming to act pursuant to instructions from the Attorney-General and in compliance with the request of the Secretary of War, requested leave of Court to dismiss the proceedings. The respondent objected on the ground that there had been a taking. The Government conceded that if there was a taking there could be no dismissal. The situation there was exactly as it is in the case at bar with reference to a taking. The Government there desired the right to overflow a strip of land lying in the floodway. Judge Borah, in a very able opinion, held that there had been a complete taking in fact. In that case, as in the case at bar, there were gaps left for railroads and bridges, so that the project was substantially completed. The Court said:

“The fact that the existing gaps have not been closed, and that the main levee between the spillway

and the river has not been cut, is of no material importance, considering the magnitude of the work. For all practical purposes the spillway is, and has been since June, 1931, complete and ready for operation whenever the need therefor shall arise. The United States has acquired and taken every right needed for the spillway project, and the property of the respondent has to all intents and purposes been subjected to every possible use contemplated by the taking.

"These facts show a taking within the principles of law applicable and give rise to compensation in favor of the respondent. *Kincaid v. United States* (D. C.), 37 Fed. (2d) 602 (Affirmed by the Court of Appeals, 49 Fed. [2d] 768)."

This case was appealed to the Court of Appeals, but was dismissed upon stipulation of the parties, 67 Fed. (2d) 1019, a settlement apparently having been effected. Certainly the Government would have no right to abandon the project after it once built the set-back levee. The rights of petitioner have been invaded. The west portion of his farm had been condemned and cut off. The remaining property, which is here involved, consisting of 1,033.56 acres, was subjected to the servitude of additional overflows, irrespective of whether the Government ever cut the Riverside Levee or not. Petitioner's property has to all intents and purposes been subjected to every possible use contemplated by the taking. The trial court refused to permit the Government engineers to answer a question, but we quote it because we think it aptly illustrates the situation (R. p. 196):

"Q. Mr. Miller, as an engineer, do you consider this all one project, I mean the spillway and set-back levee, one proposition or one project?"

Of course, as an engineer, he would consider it one project. Anyone would consider it as such, and this Court should consider it as one project. When the set-back levee was

built the Government appropriated the flowage rights on the land in question and became liable as of that time, and when we use the word "built" we mean "started." If such is not the law, then the Government can appropriate property, hold up condemnation proceedings for years without the payment of interest or the equivalent of the value of property as of the time of taking.

We call the Court's attention to the dissenting opinion of Judge Hamilton in *Franklin v. U. S.*, 101 Fed. (2nd) 459, l. c. 464. Judge Hamilton gives the definition of a taking as follows, l. c. 465:

"The transferring by a governmental agency or public utility into its own possession or keeping or appropriating or entering into the possession or use of another's property without his consent."

Judge Hamilton reviews a number of cases on the question of taking, both those holding that a taking occurred, and those holding that a taking did not occur, and distinguishes the same. We respectfully refer the Court to his dissenting opinion.

The Court will undoubtedly read both the majority opinion and the dissenting opinion since the *Franklin* case is now pending before this Honorable Court on certiorari.

It is noteworthy that in the passage of the Flood Control Act of May 15, 1928, Congress in Section 9 of the said act, provides that the provisions of Sections 13, 14, 16 and 17, of the River and Harbor Act of March 3, 1899, are made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this act.

Section 14 of the River and Harbor Act of March 3, 1899, provides:

"That it shall not be lawful for any person or persons to take possession of or make use of for any pur-

pose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works; Provided, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest."

The record in this case (R. p. 200) shows not only that the Government assumed control, but that after the flood of 1937, the Government rebuilt the riverside levee. This would bring the situation squarely within the purview of Section 14, and would subject the levee district or the individuals who undertook to interfere with the Riverside Levee to the penalties and legal proceedings provided for in Sections 16 and 17 of the said River and Harbor Act of March 3, 1899. How, then, can the Government reconcile its present position, wherein it claims that it has not taken control of the Riverside Levee with said Section 9 of the Flood Control Act, which incorporates the said provisions of the River and Harbor Act and expressly provides for noninterference with the levee. This was definitely the purpose of Congress in including within the scope of the Flood Control Act the said Sections 13, 14, 16 and 17 of the River and Harbor Act of March 3, 1899.

This Court held there was a taking in the case of Jacobs

v. U. S., 290 U. S. 13, where the Government constructed a dam and intermittently overflowed agricultural land in consequence of the construction. This Court held there was a taking in U. S. v. Lynah, 188 U. S. 445, where a rice plantation was affected as a result of improvements in navigation. The owner of certain real estate bordering on the Savannah River brought an action to recover against the Government in placing dams and other obstructions in the river in such a manner as to hinder its natural flow and to raise the water so as to overflow the land of plaintiff to such an extent as to cause a total destruction of its value and destroying the use of the same. There was no proceeding in condemnation instituted by the Government and no attempt to take and appropriate the title. The evidence showed that a large portion of the land flooded was in its natural condition between high water mark and low water mark and was subject to overflow as the water passed from one stage to another; that this natural overflow was stopped by an embankment, and in lieu thereof by means of floodgates the land was flooded and drained at the will of the owner. It was shown that by seepage and percolation through the embankment and an actual flowing upon the plantation above the structure, the water was raised in the plantation about eighteen inches, and that it was impossible to remove the water, so that the plantation was unfit for the cultivation of rice. Under these circumstances this Court said, l. c. 469:

“Does this amount to a taking? The case of *Pumpelly v. Green Bay Company*, 13 Wall. 166, answers this question in the affirmative.”

In the *Pumpelly* case a dam was constructed across the Fox River, by means of which the land of *Pumpelly* was overflowed and rendered useless. This Court quotes from the *Pumpelly* case, as follows:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

This Court further says, l. c. 470:

"It is clear from these authorities that where the government by the construction of a dam or other public work so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. * * * and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner."

This Court makes the distinction in the *Lynch* case be-

tween a rightful taking and a tortious act. It is this distinction that the Government has wholly failed to observe in taking its position in this case. Everything that was done in connection with this project was done pursuant to the Flood Control Act of May 15, 1928. This is not a case where the Government has tortiously damaged property or has damaged the same consequentially. The damage to this property has been done pursuant to a law passed by Congress. Upon the passage of the Flood Control Act the owners of property were forbidden to interfere with the riverside levee or to take any steps that would interfere with the project. In enacting into the Flood Control Act the provisions of Sections 13, 14, 16 and 17 of the Harbor Act of 1899, Congress had this very thing in mind. Nobody other than the Government, through its duly constituted agencies, has any right to interfere with the riverside levee or to raise the same, the effect of which would be to damage Cairo. If the Flood Control Act was not in effect, why did the Government condemn 105.34 acres along the western side of this farm? What right has the Government to divide the project? It is all one plan. The building of the set-back levee was part and parcel of the project in question, and if there was not a taking when the Flood Control Act was passed, there certainly was a complete taking of the easement in question when the Government started to build the set-back levee and cut off 105.34 acres from this petitioner's property.

In *U. S. v. Cress*, 243 U. S. 316, a lock and dam were constructed by the Government in a river whereby the level of the river was raised and land of the claimant was affected thereby. The *Cress* case is undoubtedly one of the leading cases. There this Court, in an opinion by Mr. Justice Pitney, held:

(1) That the facts amounted to a partial taking of the property;

(2) That the United States was liable *ex contractu* to compensate the owner to the extent of the injury;

(3) That, upon payment, the United States would acquire an easement to overflow the land as often as would necessarily result from the use of the lock and dam for navigation, the fee, however, remaining in the private owner;

(4) That the riparian owner also was entitled to compensation for impairment of the value of his land caused by the destruction of a ford over the tributary used in connection with a private way appurtenant to the land.

This Court, in the *Cross* case, referring to the making of improvements in navigable streams, said (l. c. 326):

“But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment (citing cases).”

Furthermore, this Court in the *Cress* case distinguishes the cases which are relied upon by the Government, such as *Gibson v. United States*, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Bedford v. United States*, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river. The injury done to the claimant's land was an effect of natural causes. This Court, in the *Bedford* case, said (l. c. 225):

“In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynch* case in the cause

and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions."

In *Jackson v. United States*, 230 U. S. 1, 23, relied on by the Government, the owners of land on the east bank of the Mississippi River claimed compensation for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees, designed to prevent crevasses, retain the water in the river, and thus to improve navigation. This Court held in the *Jackson* case that there was no direct invasion of the lands of the claimants. The damages were altogether consequential. In the *Jackson* case the state and local authorities continued to construct levees for protection. The Government had failed to construct additional levees along the Mississippi Valley, so as to afford protection from overflow. These levees combined with those levees constructed by state and federal authorities at other points.

This is a totally different situation from that in the case at bar, where the **intention** is to overflow when the river reaches a certain stage on the Cairo gauge, and where this very act is designed to overflow this petitioner's land and where everything that has been done up to the present time has been done pursuant to the act, and where the act contemplates compensation. See also the following cases: *U. S. v. Grizzard*, 219 U. S. 180; *Hopkins v. Clemson College*, 221 U. S. 636; *Peabody v. U. S.*, 231 U. S. 530. The Government also strongly relies on the case of *Matthews*

v. U. S., 87 C. Cls. 662. This was a suit brought to recover something over a million dollars from the Government for a taking prior to the institution of the condemnation suit for an easement for flowage rights over 20,064.69 acres of land covered, for the most part, with approximately 158,228,000 feet of merchantable hardwood timber. It was contended the taking occurred May 15, 1928, which was the date of the passage of the Flood Control Act. There is a description set out in the case of the plan of the Flood Control Act between Birds Point at Cairo, Illinois, and New Madrid, Missouri, by the construction, between these points, of a second, or setback, levee several miles west of the present riverside levee, and it is shown that the plan contemplates the reduction in height of the riverside levee from a grade of fifty-eight to fifty-five feet on the Cairo gauge for a distance of about eleven miles south of Birds Point to be known as the upper fuse plug section. There was to be a corresponding reduction in a portion of the riverside levee for some distance at the south end of the floodway near New Madrid, Missouri. The Court indicates the purpose, which, as we have heretofore set out, was to permit the flood waters of the Mississippi River, when the flood stage of the river should exceed fifty-five feet on the Cairo gauge, to flow over the riverside levee just south of Birds Point and into the floodway, and to spread out over this floodway territory, and to flow slowly toward the south end thereof near New Madrid, Missouri, and, when the flood stage of the river has sufficiently subsided, to permit these flood waters and backwater in the southern portion of the floodway to flow back into the river channel through the lower fuse plug section and St. John's Bayou in the lower end of the floodway near New Madrid. The Court in its decision was strongly influenced by the fact that the land in the Matthews case had a **very low elevation.**

A reference to the opinion, 87 C. Cls. 686, 687, shows that of 20,088 acres, 19,849.8 acres, or 98.8 per cent, was below an elevation of 300. The Court in the Matthews case, l. c. 715, expressly holds that about 99 per cent of this land has always been subject to overflow to a depth of eighteen feet by backwater and surface drainage water when the water of the Mississippi River has reached a stage of fifty-five feet on the Cairo gauge. The Court further held that if the riverside levee was high enough and strong enough to afford complete protection against overtopping and crevassing at fifty-eight feet on the Cairo gauge, 100 per cent of plaintiff's land would be overflowed by backwater at a stage of fifty-eight feet. The Court expressly finds that the record does not establish that any additional headwater flowing over the Matthews land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Bird's Point to a grade equivalent to fifty-five feet on the Cairo gauge will injure, damage or place upon plaintiff's timber or land a substantial burden or servitude to any greater extent than the timber and land have heretofore suffered, and expressly found (l. c. 716) that the plaintiff would not actually be deprived of any valuable property rights which he had theretofore enjoyed and possessed in the land and timber. While the Court in the Matthews case uses some loose language (l. c. 720, 721), which, on the surface, might appear to give the Government some comfort, a careful reading of the opinion will show that the Court definitely based its opinion upon the fact that the plaintiff in the Matthews case was not damaged. Besides, the language in the Matthews case (l. c. 720, 721), in so far as it militates against our position is in conflict with the decisions of this Court and other courts, which we have heretofore adverted to under the question of "taking."

In the case of U. S. et al. v. Kincaid, 49 F. (2nd) 768

(C. C. A. 5), the Court of Appeals for the Fifth Circuit affirmed a decision of the trial court as set out in 35 Fed. (2nd) 235 and 37 Fed. (2nd) 602. The Supreme Court in the Hurley case, cited *supra*, reversed the Kincaid case, but not on the ground that there was no taking, but on the simple ground that the owner had a remedy at law, and that it was not necessary to enjoin the proceedings. In the Kincaid case it was expressly held that the Flood Control Act of May 15, 1928, required the United States to provide flowage rights for additional destructive flood waters passing by reason of diversions from the main channel (35 Fed. [2nd] 235), and further held (37 Fed. [2nd] 602) that the appropriation of the flowage rights by the Government is complete with the construction of the work designed to direct waters on the land, and is not postponed until the lands are actually occupied by the diverted waters. In this connection the Court said, l. c. 608:

“Of course, the physical occupancy of the ground in this case will not take place until and when it is overflowed by water in time of flood; but the process of subjecting it to the service and the taking possession, in so far as is either necessary or contemplated by the act, will begin with the construction of the **first levee or works** which are intended to direct the water upon the land * * *.” (Emphasis ours.)

The Court further says:

“Under the law of this state, unqualified ownership of property includes the *usus, fructus, abusus*, or the right to possess, enjoy the fruits, and dispose of the whole in the most unrestricted manner. * * * When either of these is taken away or diminished, to that extent does the owner lose a part of his property, or, which is the same, the elements that constitute ownership.”

The eminent authority, Lewis, on Eminent Domain, Vol. I, paragraph 65, states the rule as follows:

“Principles which determine when there has been a taking. If property, then, consist, not in tangible things themselves, but in certain rights in and pertinent to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of the property itself, that, whenever the rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation.” Citing cases, including *Nahant v. United States*, 136 Fed. 273, 69 L. R. A. 723.

Lewis further says (page 56; paragraph 65):

“Any substantial interference with private property which destroys or restrains its value or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed is in fact and in law a taking in the constitutional sense to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.

“It will thus be seen that in order that there may be a recovery of compensation for damages to property, no part of which is taken, such damages must be the result of violation of some one or more of the rights which constitute profits. In other words, the damage must be actionable damages, that is, damages which would be remediable if done by an individual without any pretense of constitutional authority.”

The Fifth Amendment to the Federal Constitution, among other things, provides:

“Nor shall private property be taken for public use without just compensation.”

To be a taking there must be property.

In *Buchanan v. Warley*, 245 U. S. 70, the Supreme Court said:

“Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land.”

To the same effect is *In re Crook*, 219 Fed. 979.

In 20 C. J. 566, the doctrine is stated by the text-writer as follows:

“There need not be an actual physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property.”

The Jadwin plan contemplated the practical taking over of the Riverside Levee by the Government and the undisputed evidence shows that the Government asserted complete dominion over it. The program of the levee district for raising the levee was halted. Without going into details of the plan, it is obvious that appellant's free use and enjoyment of his lands and the property herein involved were materially interfered with from the time the work began, if not before. If at any time he wished to sell or dispose of the land, he could only do so subject to the easement of the Government and at a reduced price. The se-

curity of his land was materially reduced as soon as the work started. His right to have the levee stand intact, or to be raised and improved as a protection to his land, disappeared.

Would the Government permit any levee district or any group of individuals or any person to build the Riverside Levee up to sixty-five feet, which would be a complete protection to the land of this petitioner and others situated in the floodway area? Would not the Government immediately invoke the applicable provisions of the River and Harbor Act of 1899, which we have heretofore adverted to? See also the case of Shoshone Tribe v. United States, 299 U. S. 476, which the Court of Appeals cites in its original opinion in support of its view that there was a taking as of October 21, 1929.

In the case of United States v. C. B. & Q. R. Co., 82 Fed. (2nd) 131, Judge Faris rendered an opinion and very briefly discussed the question of interest. Judge Faris there said, l. c. 134:

"As a foreword, it may be premised that, if well-nigh the unanimous voice of stare decisis shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream; and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of appellee), beyond that provided by nature could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained. United States v. Lynah, 188 U. S. 445, 23 S. Ct. 349, 37 L. Ed. 539; United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746; Jacobs v. United States (C. C. A.), 45 F. (2d) 34; United States v. Wheeler Township (C. C. A.), 66 Fed. (2d) 977."

Further in the opinion Judge Faris makes the distinction we have made above in connection with the cases cited by the Government, in the Government's motion for rehearing in the Court of Appeals, wherein the Government cites such cases as Jackson v. United States, 230 U. S., page 1, and other cases cited on page 138 in the C. B. & Q. case. Those were actions under the Tucker Act. In each of them the Court held that the damages arising were consequential and not proximate. In none of them was there any physical taking of any part of the plaintiffs' land. Judge Faris, on page 139 of the C. B. & Q. opinion, states that:

"To the word 'taking' there has now been added by almost unanimous decision, bottomed on changes in the organic law, or by statutes, or by judicial interpretation in the latter cases, the words 'or damaged,' "

and he says that the Supreme Court of the United States has conceded in such cases as Jacobs v. United States, 290 U. S. 13, that just compensation means all of one's damages.

The case of the United States v. C. B. & Q. R. Co., 90 Fed. (2d), page 161, a decision by the Seventh Circuit, refers to and approves the rule as laid down by Judge Faris in the C. B. & Q. case, cited supra, and the Court goes into the question of consequential damages, proximate damages, etc., and holds that riparian owners have the right to erect and maintain their property in reliance upon natural levels, widths and flows of navigable streams, and that, while the Government may increase the burden of natural servitude, it may not do so without just compensation.

It follows, therefore, that the building of the set-back levee constituted a carrying out of the Floodway Act of 1928, and it follows that the Government took the ease-

ment in question as soon as it started to construct the set-back levee, if not upon the passage of the Flood Control Act itself. We think there is an interesting question raised as to how far the Government could go to prevent interference with the Riverside Levee upon the passage of the Floodway Act of May 15, 1928, particularly in view of the fact that under paragraph 9 thereof it included in its scope and operation those sections of the River and Harbor Act which we have heretofore adverted to. To be frank with the Court, we would be inclined to recognize the right of Congress to repeal the Act of May 15, 1928, prior to the time that anything was begun pursuant to the act, but we are equally convinced that as soon as work started under the act there was a taking of the easement in question and the obligation on the part of the Government to compensate the owner of such property. The Court of Appeals for the Eighth Circuit in the *Sonnenbarger* case held that the time of the filing of the condemnation suit is immaterial. This is undoubtedly correct. Could the petitioner have sold this tract of land, No. 243, free and clear of the servitude imposed by the Floodway Act of 1928 at any time after the Government began construction of the set-back levee? It is obvious that anybody buying the land would buy it subject to that servitude. Therefore, there must have been a taking within the definition set out above by the numerous authorities cited and quoted from.

B.

ON THE QUESTION OF THE JURISDICTION OF THE TRIAL COURT TO HEAR THE CLAIM OR ENTER JUDGMENT FOR THE AMOUNT AGREED UPON BY THE GOVERNMENT AND THIS PETITIONER AS THE EXTENT OF DAMAGES OR AS THE VALUE OF THE FLOWAGE RIGHTS.

1.

"When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

This language is quoted from the case of *U. S. v. Thekla*, 266 U. S. 328, l. c. 339, 340. This Court further gave as the reason for its rule, l. c. 341, that:

"the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases, the question of damages to the colliding vessel necessarily arose, and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453, 465, 466. We gather that our conclusion accords with the opinion of the English courts. (Citing cases.) * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

In *The Nuestra Senora de Regla*, 108 U. S. 92, this

Court held that when the Government brings a proceeding in one of its own courts that it is bound by the submission, and it is the duty of the Court to proceed to the final determination of all of the questions legitimately involved.

In *The Paquete Habana*, 189 U. S. 453, this Court held that where the United States files a proceeding in court that an affirmative decree may be rendered against the United States in the said proceeding.

To the same effect are *United States v. Wilkins*, 6 Wheat, 135; *Gratiot v. U. S.*, 15 Pet. 336; *U. S. v. Bank of Metropolis*, 15 Pet. 377; *Bull v. U. S.*, 295 U. S. 247.

In the case of *The Gloria*, 286 Fed. 188, many of the authorities are reviewed, and the Court comes to the conclusion, l. c. 193, that the

“sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. * * * It would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant. * * *”

(l. c. 194)

“There is no principle of public law exempting a sovereign state from its obligations under the law.”

And it was therefore held that the defendant had a right to file a counterclaim setting up that the plaintiff, the Kingdom of Norway, had failed to perform its contract for the purchase of 4,500 tons of sugar.

In *U. S. v. Stephanidis*, 41 Fed. (2) 958, affirmed 47 Fed. (2) 554 (C. C. A. 2nd), the United States brought a suit for the purchase of a steamship, **Kilpatrick**. There was a counterclaim filed for breach of warranty. On motion to dismiss the counterclaim the Court refused to do so, holding that the Court had a right to have all of the rights of the parties determined in the case.

In *The Barbara Cates*, 17 Fed. Supp. 241, the Court, in considering the question of whether a counterclaim would lie against the United States, said (l. c. 244):

"I am satisfied that under the principles of *The Thekla*, 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313, the counterclaim or cross action could be maintained either at law or in admiralty."

The Court distinguishes the case of *Nassau Smelting & Refining Co. v. U. S.*, 266 U. S. 101, which is the case relied on by the Government in the instant case, on the ground that the *Nassau Smelting & Refining Co. Works* case was based upon the Dent Act (50 U. S. C. A., Sec. 80, note), under which Congress had confined jurisdiction to the Court of Claims exclusively. The Court further said:

"There is nothing to limit the broad principles of *The Thekla* to admiralty cases only." (Emphasis ours.)

In *United States v. National City Bank of New York*, 83 Fed. (2nd) 236, the rule is laid down that inequity, inconvenience will not be allowed to accomplish injustice by preventing set-off, where it appears that defendant has no adequate means for recovery in a separate action. It is also held that where a sovereign brings a suit he is obliged to submit to jurisdiction of the Court in regard to a set-off or counterclaim properly assertable as a de-

fense in a similar suit between private litigants, and claims arising out of the same transaction may be set off against the sovereign. The same transaction within this rule does not necessarily mean occurring at the same time, but may comprehend a series of many occurrences, depending upon their logical relationship. In this case the United States sued as assignee. The Court cites some of the cases we have cited above, and holds (l. c. 238):

“The Supreme Court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors (citing cases).”

The Court, after citing the Gloria case, *supra*, and the case of *French Republic v. Inland Nav. Co.*, 263 Fed. 410, states:

“Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences.”

The question of the validity of a similar contract has recently come before the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Wachovia Bank & Trust Co., Guardian, and J. Harper Erwin, Appellants, v. United States of America, Appellee*, decided August 26, 1938, 98 Fed. (2nd) 609 (C. C. A. 4). In this case the shoe was on the other foot. The Government desired to enforce a contract that it had made to purchase certain land at \$8.50 an acre. On March 18, 1935, the Government secured an option providing that at any time within twelve months from the date of the same, if requested to do so by the Secretary of Agriculture, the owners would sell the land in question at \$8.50 an acre; that in case the vendors were unable to show an established title satisfactory to the Attorney-General, the Government would, if it saw fit, institute proceedings for the condemnation of the said

land. The option also provided that, pending the vesting of title, the United States, if it elected to do so, should, upon acceptance of the option, use or occupy and administer any or all of the lands in question. There was a minor involved in the case and it was provided that an order of Court be obtained approving the option. Twelve days later the Department of Agriculture wrote the Wachovia Bank & Trust Co., guardian, that the Department had elected to purchase the land under the option. There was some difficulty in clearing the title and it was agreed to institute condemnation proceedings. After the report of the appraisers, the cause came on to be heard before the court below on October 13, 1937, at which time the Court entered its judgment of condemnation. There were two questions involved in the case: First, whether the guardian was bound by the option after the expiration of the twelve-months period fixed in the option, although accepted within that period. Second, whether in the condemnation suit the value of the tract of land was limited by the price fixed in the option. The United States Circuit Court of Appeals for the Fourth Circuit held the condemnation proceedings would take some time, and therefore the acceptance of the option within one year contemplated that the proceedings might require more than a year to complete. The Court also decided that the respondents, that is, the landowners, **did not** have a right to show that the value at the time of the appraisal was greater than the price of \$8.50 fixed in the option, and held that the **Court did not err in refusing to hear evidence tending to prove values.** The Court further held that upon the acceptance of the option it became converted into a bilateral contract binding upon the parties, and that the vendors were bound by the price per acre fixed in the option. The Court further held that the agreement provided that the price was fixed, even in the event of condemnation, and that condemnation proceedings were con-

templated in the option. The Court further held that parties to the option are bound by the price fixed in the option; that while one not a party to the option is not bound by the option price in condemnation proceedings where appraisers fix the price, the parties to the option are bound, and the judgment of the trial court fixing the amount at the option price was affirmed.

Thus the Court will see that this case is squarely in point with the case at bar, wherein the Government and Danforth agreed upon the extent of the damages, and agreed in the said offer and acceptance that condemnation proceedings might be instituted, with the request that an agreed verdict be had in the amount of the offer, because payment could not be made without Court action, as title could not be cleared. This is not a case of fraud or irregularity. Everything done in connection with the offer made was done by the Government through its duly authorized agent. It was duly accepted. It became a binding contract. The only thing necessary left to be done was to clear the title. We submit that what is sauce for the goose is sauce for the gander. Was the landowner bound by contract? If he was, so is the Government bound. For this great Government to appear in the Fourth Circuit, insisting upon the validity of a similar contract fixing the price and prevailing, and then coming before this high Court and repudiating its contract and refusing to recognize its contract price, is flaunting too much in the face of the adage, "Consistency, thou art a jewel."

The Fifth Amendment to the Constitution of the United States provides among other things, that "no person is to be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Will anybody question the assertion that the rights under a valid contract are property within the meaning of this amendment? Since it is property, is not the peti-

tioner deprived of his property without due process, where he is denied a proper remedy, to enforce a recognized right although in the same proceeding his property is taken? If the position of the Government is correct, there is a clash in the constitutional rights of the sovereign government and of the individual person. It would not do to argue that because the contractual rights of the petitioner are affected that the sovereign government would not have a right to bring a condemnation suit. Nor would it do to argue, as the Government has heretofore contended, that whatever rights the petitioner has under the contract he must enforce in a Court of Claims. If he is relegated to the Court of Claims, would it not affect the right of the Government to bring a condemnation proceeding until the petitioner's rights are determined in a Court of Claims, or would it be in order to have two suits pending, one in a Court of Claims and one a condemnation suit? This argument is particularly strengthened where the rights of third persons are affected, as is usually the case when a condemnation suit is brought. There are usually other interests involved. It so happens that in the case at bar the petitioner paid off a mortgage of some \$50,000.00, so that he is the only person involved here, but such is not ordinarily the case. Is it not a far more equitable and logical procedure to have the rights of the parties determined in the one suit where the rights of both the sovereign and the individual can be determined? Does not such orderly procedure obviate minimizing the right of the sovereign to condemn property under its power of eminent domain? The Government admits the validity of the contract in question and claims that the Government could have enforced the contract in the condemnation suit, but contends that the petitioner has not the reciprocal right of so doing. We are not seeking in this action to recover anything against the Government. We are only seeking com-

compensation for the damages sustained by reason of the taking. The amount of the damages or the value of the easement in question was fixed by the parties **at the request of the Government itself**. The Government can only condemn property upon the payment of just compensation. The petitioner is not questioning the right of the Government to condemn. In the case at bar there was no occasion for the Court to pass upon the damages or to appoint commissioners, since the parties themselves agreed upon "just compensation." The Court will note that the Government pleads in its petition (R. p. 9), "That the plaintiff herein and the defendants, and each of them, as owners, claimants and lessees of the property hereinbefore described have been unable to agree upon the compensation, to which said owners, claimants and lessees would be entitled for the use to which the said premises hereinbefore described would be subjected or to amicably settle upon such compensation, and that it is necessary to proceed by condemnation, as by law provided, to acquire the interest sought to be acquired by these proceedings."

The undisputed testimony shows that the contrary was the case, and but for the fact that the Government desired to clear the title, as set out in its offer, it would have had no occasion to proceed with the condemnation proceedings, on the theory that it was unable to agree with the landowner. In fact, the issue in failing to agree, as set out in the Government's petition, was contradicted by the evidence as offered by the Government (R. pp. 108, 109). Even in the absence of an answer or counterclaim or any other pleading, the landowner would be entitled to prove his damages and the contract in question would have been admissible and binding upon the parties. *Chicago v. Chicago R. R.*, 166 U. S. 226; *Springfield etc. Ry. Co. v. Calkins*, 90 Mo. 538, 3 S. W. 82; *Mo. Power & Light Co. v. Creed*, 32 S. W. (2nd) 783.

The Court should remember that the offer came voluntarily from the Government after a thorough investigation, after three separate appraisals, as we have heretofore shown. Therefore this case comes squarely within the purview of that line of cases including those of this Court, which we have heretofore cited, some of which we have quoted from, holding that where the Government voluntarily comes into court the Court has jurisdiction to litigate all of the rights of the parties growing out of the transaction or subject matter involved and to do complete justice between the parties in the matter. The rule we contend for has been greatly liberalized in recent years, and this Court has broadened the rule in such cases as *Bull v. U. S.*, 295 U. S. 247. This is not a case where the petitioner had a separate transaction with the Government, that it is now seeking to enforce in this suit. It is a situation where the parties by contract fixed the damages or agreed upon the value of the flowage rights. The Government admits the contract is valid and binding. The Court of Appeals found it to be so. It is true that if the Government had not brought condemnation proceedings, that it might have been necessary for the petitioner to have filed a claim in the Court of Claims. Then the Government would have contended that the damages could not be ascertained until the condemnation proceedings were finally completed and determined, showing that the compensation or damages fixed by contract was part and parcel of the transaction, and that all of the proceedings were one transaction. Now, having voluntarily come into court, and having pleaded that the parties could not agree upon the damages, the United States created the issue by its pleading and by its appearance in court, and gave this petitioner the right to have all of his rights determined in this case, since the petitioner's right to compensation is an integral issue in the condemnation suit. Therefore, the

cases cited and relied on by the Government, which hold that parties can only sue the Government under some statute authorizing it, are wholly without application. The Government's position has heretofore been and doubtless will be in this court, that the rule we contend for, only applies in admiralty cases. So far as we know, this Court has never in any decision limited the rule to admiralty cases. On the contrary, in the case of *Paquette Habana*, 189 U. S. 453, the proceeding is one at law, and this Court held that the **procedure should conform to the state law**. Common justice and equity (admitted by the Government in the Court of Appeals) demands and requires, that all of the rights of the parties be determined in this suit.

CONCLUSION.

Taking.

The Government to all intents and purposes has taken the property in question, that is, has taken the easement involved within the definition of "a taking." The cases upon which the Government has been relying and which it doubtless will cite to this Court are without application. We have endeavored to point out some of these cases. The Government will have an opportunity of attempting to distinguish the cases that we have cited and quoted from. We believe it will be impossible for the Government to distinguish the recent cases on the question of taking that we have heretofore set out and discussed, and we further believe that it will be impossible for the Government to show that the facts in this case do not bring the situation squarely within the purview of the definition of taking as set out by the recognized authorities. If we are correct in our conclusion, then this petitioner is entitled to interest from the date of taking. We do not believe that this Court should fix the date of taking at any later date than

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the date when work was started on the set-back levee, namely, October 21, 1929.

Enforcement of Contract.

We submit that there is absolutely no valid or legal reason why the Court should not enforce the contract in question and enter up a judgment in the sum of \$31,681.98, together with interest from the time of taking. The record, page 187, shows that the petitioner paid off a mortgage of something over \$50,000, based upon a loan of approximately \$50 an acre. We know that immediately prior to the enactment of the Floodway Act the insurance companies were making loans of approximately \$50 an acre in the area where this land was taken. Following the enactment of the Floodway Act, they refused to make any loans on property in the Spillway area. We think the Court will take some notice of the fact that insurance companies require some substantial margin of safety before they make loans on property. Presumably insurance companies would not lend more than 50 per cent or at the most two-thirds of the value of the property. If we assume, for the sake of argument, that \$50,000 represents two-thirds of the value of the property, we have a piece of property worth at least \$75,000. The Government itself, through the proclamation of President Coolidge, recognized that the damage will be at least 66 per cent. On this basis the damage would be \$49,500. If the damage is based on two-thirds of the assessed value, the record shows that the figure offered by the Government of \$31,681.98 is within the amount authorized. Therefore, from any angle, whether it be legal or equitable or as a matter of fairness, the petitioner is entitled to have his contract enforced. The contract in question is the yardstick or measure of damages. The Secretary of War, through his duly author-

ized representative, came to petitioner and made the offer, which was accepted. It was lawfully made in accordance with the authority that the Secretary of War had and in accordance with the proclamation issued by President Coolidge. Did the Government have the right at the trial to come in and tell this taxpayer that while he was paying taxes on the basis of the assessed value and while he paid interest on the mortgage in excess of \$50,000 that the Government could and would repudiate its contract and compel him to accept the Government's wholly inadequate offer of \$16,868.80 (R. p. 147) or else?

We call the Court's attention to the fact that the appraisal made by the Department of Agriculture was made in 1931, three years after the Floodway Act went into effect, and long after the work had started in October, 1929. Can any fair-minded person, reading this record, conscientiously say that this land that readily carried a \$50,000 loan prior to the project was not damaged, at least to the extent of the settlement price of \$31,681.98?

We submit that the principles as laid down in the Wachovia Bank & Trust Co. case, supra, and other cases cited, governing contracts of the Government with land-owners, are controlling here; that this contract, solemnly entered into by the Government, after full and careful consideration, and at the Government's request, should be enforced. Both reason and logic and equity, as well as legal principles, call for its enforcement in this action. We, therefore, respectfully ask the Court to reverse the case, with instructions to have a judgment entered up in favor of the plaintiff for the easement in question and for a judgment in favor of the defendant in the sum of \$31,681.98, together with interest from the time of taking, namely, October 21, 1929, or, if this Court believes the time of taking is the time of completion, or substantial completion, of

the levee, October 31, 1932, then that the interest be added from the latter date.

Respectfully submitted,

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APPENDIX,

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*), provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project

and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway; spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

Sec. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately \$292,000,000, heretofore made by the local interests in the alluvial

valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks

of the river; it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Sec. 4. The United States shall provide flowage rights for additional-destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

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Sec. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the

direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be \$10,000 per annum, and the salary of the other members of the commission shall hereafter be \$7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

Sec. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

No. 309.

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CHARLES ELMORE DROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

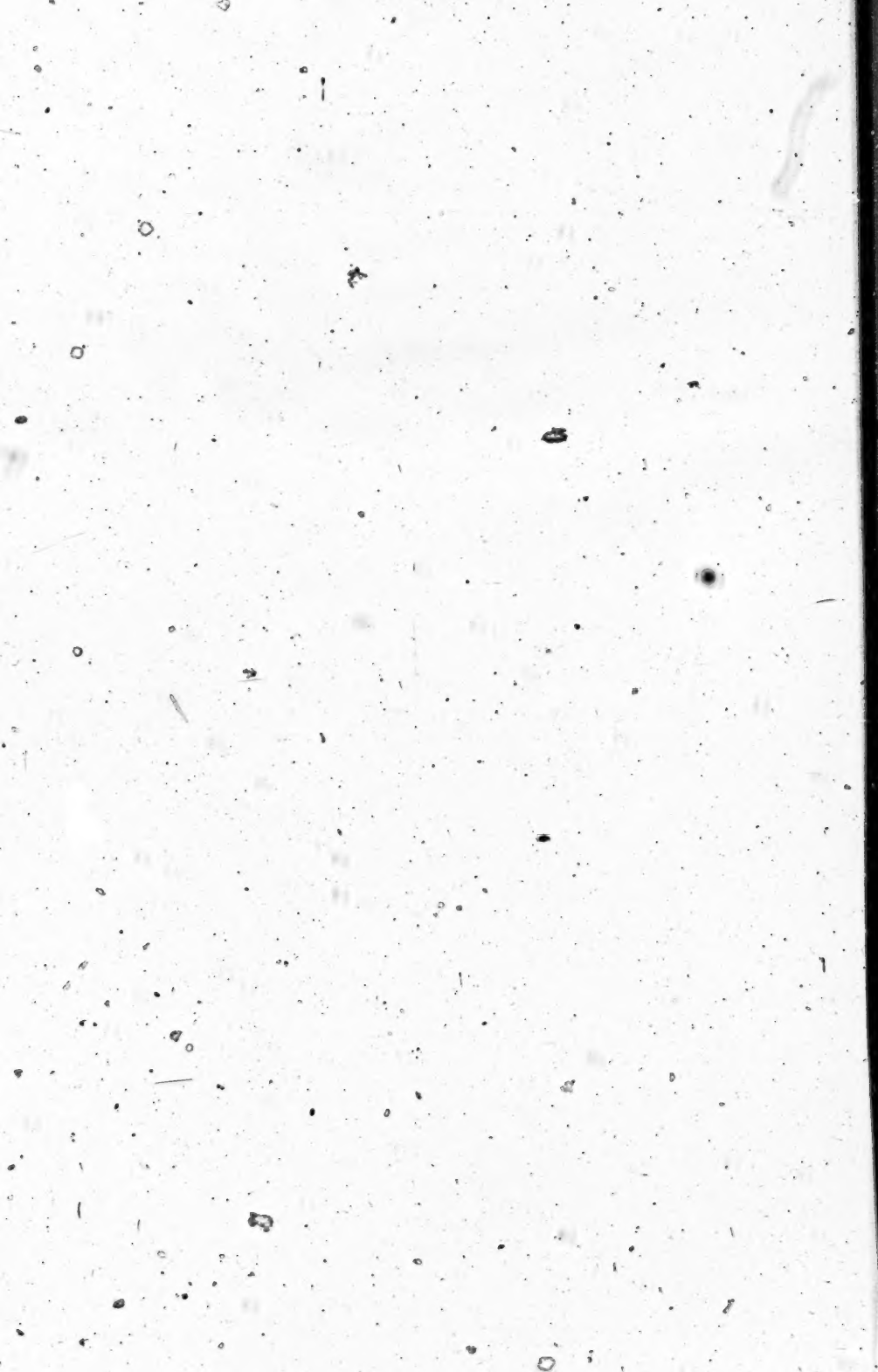
WILLIAM H. DANFORTH, Petitioner,
vs.
UNITED STATES OF AMERICA; Respondent.

On a Writ of Certiorari to the United States Circuit Court of
Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

ON THE QUESTION OF "TAKING."

We are just in receipt of the Government's brief, today, November 3, 1939, and hasten to briefly reply to the same.

It is first said (Government's Brief, page 6) that "No part of the set-back levee has been or is to be built on the land involved in this proceeding." We have heretofore touched on this point (Petitioner's Brief, page 5) to indicate that when the strip of 105.34 acres was cut off the western side of petitioner's farm it was not an isolated or independent transaction of the Government, but was part and parcel of the project here under consideration, namely,

the Floodway Control Plan. The Government had no need or use for this strip of land unless it was used in connection with the project under consideration. It follows, therefore, that the Government's attempt to separate the taking of the strip of land in question from the project as a whole must of necessity fall flat: The taking of the strip in question, followed by the building of the set-back levee, on the strip, was part of the Floodway Project and was an important step in the same because, without the set-back levee, the project could not proceed or operate. The Government could have condemned the easement and the strip in question in **one action at the same time**. There certainly would have been no question about a "**taking**" if the Government had done that. The mere fact that the Government saw fit or found it more convenient to file two condemnation suits instead of one does not change the date of taking. We had this very question in mind when we asked the Government engineer, Mr. Miller (Record p. 196), if it was not all one project. (This is referred to in Petitioner's Original Brief, page 25.)

It is next contended that Colonel Reybold, in dynamiting the levee, did so without orders from any of his superiors. Colonel Reybold was the officer in charge of the Memphis Engineers District No. 1. He had no superior in that area. He had the authority and the right, as he testified, to place the Birds Point-New Madrid Floodway in operation (Rec. pp. 196, 197, 199). He did so. In this connection, counsel for the Government suggest that the position of the petitioner is not clear regarding the authority of Colonel Reybold to do this act (Government Brief, p. 40). On page 27 of petitioner's brief a reference is made to the record, page 200, showing not only that the Government had control, but that after the flood of 1937 the Government rebuilt the riverside levee. Colonel Reybold was in charge and had full authority. There is no

presumption that he was acting without authority. The floodway project belonged to the Government. The Government had a right to put it in operation. The Government is now trying to make a tortious act out of the conduct of Colonel Reybold. We do not say, as the Government suggests, that the acts of the Government in 1937 constituted the time of taking. The taking had already taken place long before, when the set-back levee was started, in 1929 or, at any rate, when it was completed in 1932. In 1937 the Government simply exercised its right to put the floodway into operation. How would the Government put the project in operation other than it did in 1937? The cutting down of the three feet in the fuse-plug section was only one step in the Jadwin Plan. This did not prevent the operation of the Plan by the Government in 1937. If the fuse plug had been cut in 1937 the only difference would have been that the water would have passed over the riverside levee at fifty-five feet instead of at the point where it did. The set-back levee would have functioned exactly as it did. It was completed in 1933 and ready to operate. The failure to cut off the three feet would not have prevented the operation at any previous time. After the building of the set-back levee the project was placed in a position where it could be operated, and it would have been operated by the Government prior to 1937 had the occasion arisen. Can anyone doubt this? The failure to cut the fuse-plug does not prevent a taking. The cutting of the fuse-plug has nothing to do with the time of taking. The time of cutting is left to the Government. The mandate in the act is to give "the areas within" the same degree of protection as is afforded by levees on the west side.

It is difficult to understand how anyone can argue that putting the project in operation was in violation of the mandate of Congress (Government's Brief, p. 40). There

is nothing in the Floodway Control Act that prohibited the operation of the floodway as soon as it was ready to operate. We think counsel have wholly misconstrued the intent and purpose of the act when they contend that the floodway cannot be placed in operation until the Government has paid for the easements or the land in question. Congress never intended this project to be held up until such time as the Government paid. Payment is not a prerequisite to a "taking." Suppose in 1933, or as soon as the set-back levee was practically completed, there had been a major flood. Does the Government contend for one minute that it would not have put this floodway into operation, simply because it had not entered up judgments or had not paid for the easements in the floodway area? To ask this question is to answer it. Besides, the action of the Government in dynamiting the levee in 1937 is a sufficient answer to this question. The provision of the act that the Government refers to provides:

"Provided further, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening and enlarging the levees on the east side of the river."

Where is there any mandate in this provision forbidding the Government from operating the floodway or from taking it? On the contrary, the mandate is to have the **Government** give the same degree of protection as was afforded by levees on the west side of the river contiguous to the levee at the head of the floodway. In other words, the act itself provides that the **Government** is to assume

charge and is to give the same degree of protection. Do counsel for one moment seriously contend that the local levee districts would have a right to build up the levee to, let us say, sixty-five feet, which could be done as a practical engineering proposition?

Counsel for the Government state that Section 14 of the River and Harbor Act of March 3, 1899, forbidding interference with levees and other structures made applicable by Section 5 of the 1928 Act, only applies to structures "built." We think that a reference to the said act will show otherwise. It refers not only to "work built by the United States" but refers to "any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, etc." It obviously was the purpose to protect such works; whether built by the United States or not, so long as they are under the control of the United States. Furthermore, a levee built by the United States after a levee has been torn down or dynamited or in any way removed and then rebuilt by the United States is a levee built by the United States within the purview of this statute. We have no desire to repeat what we said on pages 26, 27 and 30 of petitioner's brief, but it is obvious that the floodway area, the set-back levee, and the riverside levee in the fuse plug were wholly under the jurisdiction of the United States, and no private individual, or group of private individuals, including levee districts, had or have any legal right to interfere with the riverside levee or the set-back levee or any part of the same, nor had they any right to interfere with the operation of the floodway, after the Government took charge, October 21, 1929, and certainly not after the set-back levee was completed on October 31, 1932. Besides, what right did the

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Government have to restore the riverside levee after the flood of 1937, if it did not have control and jurisdiction over the same? What right did the Government have to first issue instructions to restore the same to the height of fifty-five feet on the Cairo gauge, and then to countermand the order, and restore it to fifty-eight feet on the Cairo gauge? The record shows (R. p. 200) that the instructions were issued from the office of General Edward M. Markham, and came through military channels, in the regular and usual way. It would seem that the present position of the Government is wholly inconsistent with its action and its position at that time, in 1937.

The brief of the Government then discusses the question as to which water reached the petitioner's land first, that from the natural crevasse or that from the artificial crevasse. What difference does it make in this case? This is not a suit for damages caused by the flow of water, either from a natural or an artificial crevasse. This is a suit to acquire an easement and the questions involved are those of a "taking" and those of certain rights growing out of an admittedly valid contract between the Government and the landowner, and the question of which water reached the petitioner's land first is wholly immaterial. It is impossible to tell at this time whether the water from a natural crevasse or from an artificial crevasse will reach these lands first during the next flood. It depends upon where the crevasse will be upon wind conditions, and upon other factors. The question of which water reached the petitioner's land first constitutes no evidence of a taking.

It is then contended by the Government that there is no evidence in the record to show that the estimated increase in depth during the 1937 flood did actually cause any damage to petitioner's property which would not otherwise have occurred. We have heretofore shown in

petitioner's original brief (page 7) that the effect of the set-back levee is to increase the depth, velocity and duration of the overflow over and above what the depth and velocity and duration of the overflow would be without the set-back levee. We have no desire to repeat what we there said, but it is perfectly obvious that with six feet of additional water standing on this farm it would stay on there much longer than with six feet less of water. There would be more current, greater velocity, more action and more damage. Again we say that what happened in 1937 is only some evidence of what may happen. It is conceivable that even a worse flood than that of 1937 may occur, and the increased depth and increased volume of water is bound to cause more damage than water which is six feet less in depth would cause. In this connection the Government attempts to argue that a greater depth of water occasioned by the artificial device of this project gives rise to no cause of action (Government's Brief, pages 24, 25, 33, 36). It is argued that the mere fact that waters are confined on the land in question would not constitute a taking, but merely consequential damages and a number of cases are cited. None of these bear out the Government's contention. We proceed to briefly discuss some of these cases.

In *Hughes v. United States*, 230 U. S. 24, the claim was against the United States for failing to build a levee in front of plantations for the purpose of affording them protection from the increased stage of high water which it was claimed had been created by the act of the United States in building levees elsewhere along the river. The overflow came from the inherent weakness of the existing levee and not from the new levee that had been constructed elsewhere. The situation was totally different from that in the case at bar.

In *Sanguinetti v. United States*, 264 U. S. 146, the United States constructed a canal for the improvement of navigation. The excavated material was put on the lower side of the canal, making a levee of which the dam was practically a continuation, and was the most convenient way to dispose of the material, and it also helped prevent erosion of the lower bank. During a flood the canal proved insufficient to carry off the waters which overflowed the lands of appellant, which would have been flooded to a certain degree had the canal not been constructed. None of it was permanently flooded, nor for such a length of time to prevent its use for agricultural purposes.

In *Jackson v. United States*, 230 U. S. 1, the owners of the property had built levees to protect the land from destructive overflows. The Government constructed a levee on the west bank of the river, opposite the lands of the appellant, which relieved the pressure on their private levees, but augmented the risk of overflow by increasing the danger of breaking. This Court held that a private individual had a right to construct a levee for the protection of his own property so long as he did not interfere with the natural flow of the stream, and, therefore, the United States, the state's levee boards, and similar agencies had the same power to construct levees, although in so doing the water was forced over the levee theretofore constructed by the individual.

In *Bedford v. United States*, 192 U. S. 217, the Government constructed revetments along the banks of the Mississippi at Delta Point for the purpose of preventing erosion and to force the current back into its former channel, after which the channel and current were gradually directed toward the lands of the Bedfords. The cause of the deflection of the river upon the property in question was its natural cut-off, not the construction of the revetments;

which did not change its course, but kept it at the point where nature placed it.

In *Gibson v. United States*, 166 U. S. 269, the Government constructed a dike at Louisville in the Ohio River. The appellant owned a tract of land fronting on the river. He had a landing on the island from which he loaded and shipped. By reason of the construction of the dikes ingress and egress were destroyed. This Court held there was no invasion or actual taking of appellant's property and that the damages were consequential. The landowners contended that by reason of the dam the natural flow of the Ohio River had been increased in depth and therefore the waters were obstructed and impeded in their natural flow, creating a permanent pool of water above the prior level. The Court found that the river had not been changed; that there was no permanent filling of the channel of a creek as a result of the construction of the dam; that part of the landowners' property was overflowed by the creek as a result of freshets coming down the creek from the hills and by backwater from the Ohio in times of flood; that this had always been true; that the dam had not increased or decreased the frequency or extent of these overflows.

The Court discusses a number of cases, nearly all of which have been cited in the briefs filed by counsel in this case, and then proceeds to quote from the case of *Pumpelly v. Green Bay Company*, 13 Wall. 166, saying:

"Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

The Court expressly found that, prior to the construction of the canal, the land had been subject to the same periodical overflow.

The line of demarcation is well set out by Judge Hamilton in the dissenting opinion in the Franklin case, pending here on certiorari, wherein he says (l. c. 467):

“There is a line of demarcation in each from the case at bar in that the water change was confined within the ordinary high-water level of the stream made by nature. There was no artificial increase in level, width or flow in any of these cases.”

In the case at bar Congress intended to do the very thing that was done, that is, to build a structure which would cause the land in question to overflow more frequently and to a greater depth. In other words, Congress intended and intends to use this petitioner's land as a temporary reservoir to pass water which would not otherwise pass over his land when the height of fifty-five feet is reached on the Cairo gauge. It also intended to have water remain on this particular owner's land for a much longer period of time than it otherwise would remain thereon, and intended to have greater damage done by reason of deep water caused by the set-back levee. To put it another way, the damages herein involved are direct, and therefore there is a taking within the meaning of the Constitution, and since this same intention was present when the project was started by the building of the set-back levee, there was a taking as of that time.

Even the case of *Matthews v. United States* doesn't go as far as the Government contends. The Court found that any increased costs to plaintiff in the operations of a business or in the exploitation of his timber, or any depreciation in the value of his property because of such anticipated increased costs of carrying on operations over

the set-back levee are consequential damages. That was a totally different question.

Here we have the question of additional waters that are confined because of the set-back levee, and we have a showing that damage would be done. In the Matthews case the evidence showed there would be no damage. It was simply timber land, and when the water receded there would be no damage done by reason of it, while in the case at bar the evidence showed there would be damage to the buildings, caused by the increased depth of the water (R. p. 190).

There is nothing in the act which prevents the Government from taking over the riverside levee. On the contrary, everything points to the control, jurisdiction and operation of the riverside levee, as well as the set-back levee, by the Government. Certainly, the levee districts would have no right to touch the riverside levee, much less lower it or raise it. We think counsel are confusing the term "taking" with "use." The Government can take property and never use the same, but there is, nevertheless, the "**right**" to use the same at any time the Government sees fit or the occasion demands.

The big argument that the Government presents in its brief (page 30) is that a holding by this Court that there was a taking will entail additional expense. Of course it will. Is this any argument against the proposition that there is a taking? Is not the landowner entitled to be paid in full as of the time of taking, and if his property was taken, as we contend, at the time the set-back levee was built, and he could only sell his property or use the same subject to the servitude that the Government by law imposed upon his land, is he not entitled to be fully compensated? Is the fact that the landowner receives his money ten or more years after the taking any reason for refusing him just compensation? Does not this argument fall of its own weakness?

Then the further argument is presented that if the Government, having once taken the landowner's property, decided not to include it in the floodway, that it could politely hand the landowner's property back to him without any liability. This, forsooth, was the very proposition that was presented in *United States v. Yazoo etc. R. Co.*, 4 Fed. Supp. 366, where the precise question was presented. It is obvious that the Government was unwilling to meet the issues in that case, because it had taken the property, and, therefore, was unwilling to have the Court of Appeals make a ruling on the question (Reversed and remanded on stipulation, 67 Fed. [2nd] 1019). The Government conceded in the Yazoo case, *supra*, that it could not dismiss a condemnation suit after a **taking**. Is not this argument convincing proof of the weakness of the Government's position?

It is next contended by the Government that if the river-side levee is permitted to remain fifty-eight feet on the Cairo gauge that there will be no increase in the frequency of the flooding. This is not the test of a taking. The lowering of the fuse plug section was only one of the things that was enjoined upon the Government. There is nothing in the act which sets out when the Government shall lower the fuse plug. It is like a man who buys a lot on which to build a house. The fact that he doesn't build the house doesn't change the fact that he has bought the lot and owns the same. Here the Government has taken the easement. The property owners could have brought proceedings under the Tucker Act on implied contracts, where the amounts involved did not exceed \$10,000. This Court has so held. *Hurley v. Kincaid*, 285 U. S. 95. Furthermore, counsel for the Government in this Court undertakes to construe the Act by citing an objection made by counsel for the Government in the trial of this case (Rec. p. 198). This objection is cited as authority for the propo-

sition that the War Department construes section 1 of the Act as they are attempting to construe it before this Court. This kind of authority is on a par with the quotations which counsel for the Government give as having occurred during the debates in the House of Representatives for the purpose of proving the construction of the Floodway Act of May 15, 1928. They are entirely outside of the record; are nothing but pure hearsay, and are not proper before this Court. We challenge counsel to point out to this Court any ambiguity in the Flood Control Act. If there is no ambiguity, then legislative debates or committee reports cannot be considered, since they may be properly resorted to only to solve doubt as to the meaning of a statute or constitutional provision, not to create it, and such legislative history may not be used to support a construction which adds to or takes from the significance of the words employed. *U. S. v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 73 L. Ed. 322; *Caminetti v. United States*, 242 U. S. 470, 70 A. L. R. 16.

We have neither the time nor the inclination to introduce a lot of counter quotations from other legislators who might have had opinions. We fully recognize the right of this Court to resort to legislative debates where there is an ambiguity or a question as to the meaning of the phraseology used. In *MacKenzie v. Hare*, 239 U. S. 299, 50 L. Ed. 297, it was held that where a statute expressly declared that any American woman who marries a foreigner shall take the nationality of her husband, the report of the committee upon which the legislation was enacted could not be resorted to, for the purpose of showing that the intention of Congress, in passing the act, was solely to legislate concerning the status of citizens abroad, and not to affect one remaining in the United States. This Court said:

“The act is * * * explicit and circumstantial. It would transcend judicial power to insert limitations

or conditions upon disputable considerations of reason which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

It was further held that whatever was said in the debates or reports preceding the enactment of the law must give way to its language.

To the same effect was the reasoning and ruling in *Lederer v. Real Estate Title Ins. & T. Co.* (C. C. A. 3d), 295 Fed. 672, certiorari denied 265 U. S. 589. The Illinois court, in *Hubbard v. Dunne*, 276 Ill. 598, 115 N. E. 210, likewise held that resort could not be had to resolutions, memorials, messages, reports of commissions, engineers, etc., to obtain a construction of the term "deep waterway" in a constitutional amendment

ON THE QUESTION OF THE ENFORCEMENT OF THE CONTRACT.

With reference to the enforcement of the contract the Government seems to make the point (Government's Brief, page 15) that the petitioner pitched his case solely on the proposition that he can enforce the contract, disregarding the relevancy of the contract or the weight to be given it as a measure of the value of the easement. In this the Government is mistaken. Pleadings are used to call the Court's attention to the issues in the case. It matters not whether you call a pleading an answer and counterclaim, or whether you call it exceptions, or whether you call it motion for judgment, as was done in the case at bar. All three pleadings presented the same issues. They called the attention of the Court to the fact that the parties had made a contract, had placed a value upon the easement or had fixed the damages and were entitled to carry out the agreement. The Government admits that it could enforce

the contract in this proceeding and that the individual would be bound, but contends that it cannot be enforced against the Government in this case, because it contends that if the Government were held to its contract that in so doing the Government would be sued. We contend, in the first place, that in holding the Government to the contract price of the easement that the Court would merely enforce the agreement of the parties fixing the extent of the damages; that it would merely deny the Government the right to "welch" on its contract, just as the Court in the Wachovia case, cited in petitioner's and the Government's brief, denied the right of the landowner to do so in a similar contract.

In the second place, having entered into an admittedly valid contract and having fixed the damages, or the value of the easement, the Court should have held that the parties were precluded from endeavoring to put any other value on it and were precluded from offering evidence of value other than set out in the contract as was done in the Wachovia Bank and Trust Co. case, 98 Fed. (2nd) 609, where the Government enforced a similar contract. Therefore, the motion for judgment should have been sustained (R. 109) after the Government itself offered in evidence the testimony taken in Washington, D. C., proving the validity of the contract (R. 109).

Finally, the Government, having brought this suit, invited by implication a complete determination of all the issues involved in connection with the easement in question, among which was the value put upon the easement by the parties by contract. We therefore, say that under any one of the three views the Court should have fixed the damages at the amount set out in the contract, namely, \$31,681.98, and interest from the date of taking.

In the case of Owen v. U. S., 8 Fed. (2nd) 929, cited and relied on by the Government, the Government dismissed

the condemnation proceeding **before** there was a taking. The petition of the Government showed that it was not the Government's intention to take possession of the land until after judgment. There was no averment or allegation in the answer of the landowner that there had been a taking of the land described in the petition. Since the Government had a right to dismiss, and did dismiss, it left pending a suit against the Government for \$20,000.00. The Court simply held that such a suit would not lie.

A reading of the opinion shows that if there had been a taking, as in the case at bar, that the Government could not have dismissed the action. Likewise, in the Yazoo case, cited *supra*, the Government admitted that if there was a taking it could not dismiss.

We have no desire to reiterate what we have set out in our original brief on the question of the liability of the United States to respond to a judgment against it where the United States comes into court as a suitor. There is absolutely no reason, ~~in~~ law, in principle, in equity or in fairness to distinguish between a suit in admiralty where the United States comes in as a plaintiff and a law case where the United States voluntarily comes into court. The principle, the reasoning, the justice, are identically the same.

It would seem that the Government is hard pressed for an argument on the question of the enforcement of the contract in question if the Government is compelled to resort to the argument that Section 774 U. S. C. A., Title 28, applies, in which it is provided that no claim for credit shall be admitted upon trial except such as appear to have been presented to the general accounting officer for examination and to have been by him disallowed in whole or in part. Is it the Government's contention that the law in question provides for the presentation by the contracting party with the Government, of such a contract to this account-

ing officer of the Treasury for his disapproval after the Government has repudiated the contract?

Can anyone imagine such a procedure? The contract had already been repudiated by the Government. It is obvious that this section of the statute has absolutely no application. This point is being raised by the Government for the **first time in this court.**

It is next contended that, even if the District Court had jurisdiction to adjudicate the petitioner's counterclaim based on the contract, he would not be entitled to recover interest: The cases cited are wholly without application. Interest is demanded, not because of the contract, but is demanded **from the time of "taking."** The contract fixes the value of the easement or the extent of the damages. Interest is payable as and from the **"time of taking."**

CONCLUSION.

In conclusion, we submit that there was one transaction and that the petitioner is entitled to have all of his rights adjudicated in this case. Common fairness, justice, as well as the equities, demand that the petitioner have all of his rights and obligations with the Government concerning this tract of land adjudicated in one action. The Government has in open court admitted, as set out on page 20 of petitioner's brief, that to obtain complete justice petitioner should be allowed, in one proceeding in the District Court, recovery on the contract to which he may be entitled, especially since the United States could have done so, in that forum, against him. The rule of the Thekla case governs the case at bar, for the reasons that we have heretofore set out, both in petitioner's original brief and in this reply brief. If the Government were to prevail in this action, the petitioner would be relegated to a claim for the difference between the recovery here and the contract price; that

difference, added to the judgment which was rendered in this case by the District Court, would total exactly \$31,681.98, together with interest from the date of taking. What sense or reason would there be to compel this petitioner to proceed in some other forum to recover the difference if this Court says, as a matter of law, he is entitled to recover it?

The appellant is not asserting an independent claim against the Government. He is only asking compensation for the easement in question in accordance with the contract. The Government admits, and the Court of Appeals found, that the contract in question was a valid and binding contract. It is simply a question of whether it can be enforced. If the Wachovia case is the law, and we believe it is, then neither the Government nor the landowner has a right to dispute the value of the easement after they have entered into a solemn contract.

II.

We hope that this Court will not limit the application of the rule in the *Thekla* case to admiralty cases. Neither reason nor justice nor expediency require such a harsh doctrine. But if this Court should decide that it does not care to extend the *Thekla* doctrine, this Court can still do justice in the premises by holding that the parties having entered into a contract fixing the damages could not at the trial offer any evidence regarding the value of the easement or the damages to the property in question by reason of the easement other than that fixed by the contract. The Government itself having offered the testimony proving the validity of the contracts taken in Washington (R. 109) was bound by the same. This evidence showed the value put on the easement by the parties by contract and the Court should have sustained the motion

for judgment as requested by the petitioner (R. 109). While the Court could decide this part of the case for the petitioner on this point, we feel that the question is one of great importance to the public and should be decided by the Court squarely on the proposition that the Government, having filed this suit, by implication invited a determination of all of the issues involved, and all of the issues connected with the subject matter and transaction, which would include the contract covering the easement.

With reference to the question of taking, we submit that the record in this case clearly and unequivocally indicates that the property in question was taken either on the 21st of October, 1929, when the work on the set-back levee started, or, at the latest, on October 21, 1932, when it was completed.

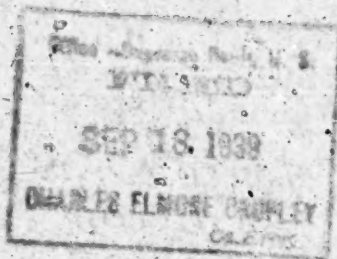
We respectfully urge the Court to reverse the ruling of the trial court and the ruling of the Court of Appeals.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 309

in the Supreme Court of the United States

OCTOBER TERM, 1939

WILLIAM H. DANFORTH, PETITIONER

v.

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 309

WILLIAM H. DANFORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 39-41) is not reported. The two opinions of the Circuit Court of Appeals (R. 221-229; 233-239) are reported in 102 F. (2d) 5, and 105 F. (2d) 318.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered July 11, 1939 (R. 239-240). Petition for a writ of certiorari was filed August 23, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in a suit brought by the United States to condemn a flowage easement, the condemnee may, in the absence of statutory consent, recover a judgment against the United States upon a contract, which, it is claimed, fixed the value of the easement.

2. Whether under the circumstances of the instant case there has yet been a taking by the Government of a flowage easement over petitioner's property, with a consequent obligation under the Fifth Amendment to pay interest from the date of the taking, as a part of just compensation, on the sum determined to be the value of the easement.

STATUTE INVOLVED

The pertinent provisions of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (33 U. S. C. Secs. 702a-702m), are set out in the Appendix.

STATEMENT

The United States instituted this proceeding to condemn a flowage easement over petitioner's land pursuant to the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. Secs. 702a-m. That Act (section 1) adopted by reference the Jadwin plan for flood control in the Mississippi valley (H. Doc. No. 90, 70th Cong., 1st Sess. (1927)). That plan recommended, among other things, the creation of a floodway along the west side of the Mississippi River

between Birds Point and New Madrid, Missouri.¹ This was to be accomplished by constructing between those points a second or set-back levee several miles west of the existing riverside levee and by reducing the height of an eleven-mile portion of the riverside levee south of Birds Point from a grade equivalent to 58 feet on the Cairo gauge to one equivalent to 55 feet on that gauge. This reduced portion was to be known as the upper fuse-plug section, and provision was also made for a lower fuse-plug section in the portion of the riverside levee near New Madrid.

When the floodway is completed and the riverside levee is reduced the upper fuse-plug section will admit water from the Mississippi River when the flood stage exceeds 55 feet on the Cairo gauge. The set-back levee will confine this diverted water to the floodway territory and will direct it to the south, where it will return to the Mississippi at the lower fuse-plug section (R. 109-112). Petitioner's land (Tract No. 243) is situated in the floodway immediately east of the set-back levee² approximately halfway between Birds Point and New Madrid (R. 7).

Construction work on the set-back levee began on October 21, 1929, and was complete on October

¹ A map of the floodway and the land involved in this proceeding is attached to the inside back cover of this brief.

² No part of the set-back levee has been or is to be built on the land involved in this proceeding.

31, 1932, except that a gap where a railroad ran through the levee had not been closed. This gap was still open at the time of the trial (R. 195-196), but has since been closed. Since the necessary flowage easements have not been acquired, the riverside levee has been maintained at its original height of 58 feet, and the upper fuse plug, which is designed to admit water into the floodway, has not yet been created (R. 111).³

On January 14, 1932, the United States District Engineer wrote to petitioner offering him \$31,681.98 for a flowage easement over his land and stating (R. 69) "Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer." Petitioner accepted (R. 69, 171). Thereafter, on July 8, 1932, the District Engineer wrote petitioner stating that after careful consideration it had been determined that the price first suggested could not properly be

³ In January 1937 the Mississippi River attained its highest flood stage in recorded history; if confined, the water would have reached 61½ or 62 feet on the Cairo gauge (R. 191). The pressure of the water opened natural crevasses in the riverside levee (R. 192-193) and thereafter officers of the United States Army artificially crevassed the upper fuse-plug section at three points (R. 201-202). The petitioner's land was flooded, as were all lands in the vicinity, but it is clear that it would have been flooded regardless of the floodway project and even if the levee had not been artificially crevassed (R. 190-191, 193). After the flood subsided the riverside levee, including the upper fuse-plug section, was restored to its previous height (R. 200).

recommended to the court, because it was in excess of what was fair and reasonable (R. 185-186).

On September 25, 1933, the Government instituted this condemnation proceeding in the United States District Court for the Eastern District of Missouri (R. 2-10). Petitioner filed an answer and a counterclaim asking the court for judgment against the United States in the sum of \$31,681.98 with interest (R. 21-25). On motion of the Government (R. 27-32) the answer and counterclaim were stricken (R. 39-41). Commissioners returned an award fixing just compensation at \$17,921.70 (R. 79) and on April 23, 1937, the District Court entered judgment that the United States will acquire the flowage easement prayed for in the petition when it pays that amount into the registry of the court (R. 78-79).

On appeal the Circuit Court of Appeals in its first opinion (R. 221-229) upheld the District Court in denying petitioner recovery on the contract, but held that a taking had occurred on October 21, 1929, when construction work on the setback levee was begun, and modified the judgment so as to include interest on the award from that date. The Government obtained a rehearing (R. 230-233) and, in its second opinion (R. 233-239), the court held that there has as yet been no taking of a flowage easement over petitioner's land. Accordingly, the judgment of the District Court was affirmed without modification (R. 239-240).

ARGUMENT

1. The court below held (R. 221-228) that in a condemnation suit brought by the United States the condemnnee cannot, in the absence of statutory consent, recover a judgment against the United States upon a contract which, it is claimed, fixed the value of the easement. The decision is plainly correct and presents no conflict of decisions. The United States cannot be sued without its consent, either by direct suit or by counterclaim against it. *Nassau Smelting Works v. United States*, 266 U. S. 101, 106; *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 504-505; *North Dakota-Montana W. G. Ass'n v. United States*, 66 F. (2d) 573, 577-578 (C. C. A. 8th), certiorari denied, 291 U. S. 672; *Owen v. United States*, 8 F. (2d) 992, 993 (C. C. A. 5th)..

Petitioner's claim is not within the \$10,000 jurisdictional limit of the Tucker Act (Judicial Code, Sec. 24 (20), 28 U. S. C., sec. 41 (20)),⁴ and he does not contend that there is any Act of Congress giving the District Court jurisdiction. Instead petitioner relies (pp. 12-13, ~~16~~) upon a line of admiralty cases culminating in *United States v. The Thekla*, 266 U. S. 328, 339-340, which held that when a sovereign "comes into Court to assert a

⁴ The jurisdiction of the Court of Claims under the Tucker Act (Judicial Code, Sec. 145, 28 U. S. C., sec. 250 (1)) is not thus limited; clearly it would have had jurisdiction of petitioner's claim.

claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter," even to the extent of becoming subject to an affirmative judgment. In that case the Court expressly stated (p. 339) that it did not "qualify * * * in any way" its decisions in *Nassau Smelting Works v. United States*, 266 U. S. 101, and *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, *supra*.

In the case at bar the United States did not come into court "to assert a claim" and did not take "the position of a private suitor." It came into court as a sovereign exercising the right of eminent domain, and its action in doing so gives rise to no implication that it consented to anything other than that just compensation be determined. Only in admiralty, where the courts are constantly confronted with the necessity of determining in one action intricate problems of liability in prize and collision cases, has the doctrine of *The Thekla* been given the scope of permitting the recovery of an affirmative judgment against the United States. The cases cited by petitioner (pp. 12-13, 16, 25) which did not involve admiralty proceedings demonstrate that outside of that field the doctrine has been limited to allowing recoupments and set-offs not exceeding the amount of the Government's claim. These cases are distinguishable from the one at bar not only because a condemnation pro-

ceeding affords no basis for an implication that the Government has "laid aside its protective cloak of immunity from suit" (R. 227), but because the United States is making no claim against the petitioner to which a recoupment or set-off could apply.

Wachovia Bank & Trust Co. v. United States, 98 F. (2d) 609 (C. C. A. 4th), also relied upon by petitioner (pp. 13, 16, 26), is fully distinguished by the court below (R. 228): in addition to the factual and procedural differences in the two cases as there pointed out, the fact that the condemnee is bound by his prior contract in no sense means that the Government, condemning in the forum where it cannot be sued on the contract, is similarly bound.

2. The holding (R. 234-239) that there has as yet been no taking of a flowage easement over petitioner's land is clearly correct and entirely consistent with all applicable authorities. Since 1914 the riverside levee has been maintained at a height equivalent to 58 feet on the Cairo gauge (R. 189-190). The Jadwin Plan contemplates the reduction of a portion of this levee, known as the upper fuse-plug section, to a height equivalent to 55 feet on that gauge. When this is done it will increase the frequency of overflow of lands within the floodway by admitting water when the Mississippi attains a stage of 55 feet instead of affording protection up to 58 feet. However, the

upper fuse-plug section has not yet been reduced and the riverside levee has not been altered (R. 111). While the major portion of the set-back levee had been constructed by October 31, 1932, the record shows that even the completed levee will not affect the frequency of flooding (R. 190).

Furthermore, the Flood Control Act in substance prohibits the reduction of the upper fuse-plug section or any other act which will subject lands in the floodway to more frequent overflow, until the floodway is completed. * Section 1 of the Act provides:

* * * That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the *west* side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with * * * raising, strengthening, and enlarging the levees on the *east* side of the river. * * * [Italics supplied.]

The sole flood protection which petitioner's land enjoyed was afforded by levees on the *west* side of the river.⁵ Moreover, the completion of the floodway involves not only the construction of the set-back levee, which was not finished until after the trial, but the acquisition of flowage easements,

⁵ There are no levees on the east side of the river opposite the Birds Point-New Madrid floodway, so that no question as to the effect of a raising of such levees is presented.

which is still incomplete. Section 4 of the Act provides:

The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River * * *

The legislative history of this provision is conclusive that it means that the floodway shall not be put in operation until after the United States has acquired flowage rights. See 69 Cong. Rec. 7000, 7104, 7105, 7106, 7108, 7111. See also *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.), appeal dismissed upon stipulation, 64 F. (2d) 1015 (C. C. A. 8th). The Court of Appeals properly regarded the provisions of these two sections as a "plain mandate" (R. 238), which entirely disposed of any contention that the Government is in a position to put the floodway into operation at this time. Nothing has been done to increase the possibility that petitioner's land might be flooded.

Certiorari has been granted (June 15, 1939, No. 72, Oct. Term, 1939) on petition of the Government in *Sponenbarger v. United States*, 101 F. (2d) 506 (C. C. A. 8th). Petitioner strives to show

* The court also recognized that in view of these sections no taking can be predicated upon the actions of army officers during the emergency in 1937 (note 3, *supra*) and did not find it necessary to consider the fact that the officers in question acted without authority from their superiors (R. 200). *Hooe v. United States*, 218 U. S. 322; *Hughes v. United States*, 230 U. S. 24.

(pp. 10-11, 26) that his rights may be affected by the decision of this Court in that case. He also urges (pp. 10, 21-23) that the decisions in the two cases, both by the Eighth Circuit, are in conflict. In its opinion in the present case (R. 238-239) that court clearly distinguished the two cases. The *Sponenbarger* case involved land in a different floodway—the Boeuf floodway—and, as the court viewed the facts, an operative fuse plug had been created by retaining a large part of the riverside levee at its 1914 grade and by raising adjacent portions to the north and south as well as the levee on the opposite (east) bank. The court believed that the higher levee would divert water over the un-raised (fuse plug) levee and said (p. 512) that the “floodway stands ready to carry off the excess waters of major floods in accordance with the provisions of [the] legislation.” Nothing of this sort has been done in the case at bar. No portion of the riverside levee has been raised and there is no levee on the east side of the river. Furthermore, in the instant case the fuse plug cannot yet lawfully be created, because to do so would decrease the protection afforded by the levee on the *west* side of the river in contravention of section 1 of the Flood Control Act. In the *Sponenbarger* case the court held (p. 512) that section 1 did not prohibit the creation of an operative fuse plug prior to the completion of the floodway; because it specifically provided that “nothing herein shall prevent, postpone,

delay, or in anywise interfere with * * * raising, strengthening, and enlarging the levees *on the east side of the river.*" [Italics supplied.]

It is thus clear that the *Sponenbarger* case and the case at bar are quite different. In the former the court was of the opinion that an operative fuse plug had been created, thus exposing the land to the additional risks of flooding contemplated by the Jadwin Plan; in the latter no fuse plug has been created, and the land in question enjoys undiminished flood protection. Only when the fuse plug is created for the Birds Point-New Madrid floodway will there be presented with respect to that floodway the question which the court held was presented with respect to the Boeuf floodway in the *Sponenbarger* case—that is, whether increased susceptibility to flooding constitutes a taking. Therefore, even if this Court should affirm the decision in the *Sponenbarger* case, the decision in this case will not be affected in any way. On the other hand, if this Court should reverse the judgment in the *Sponenbarger* case and hold that there was no taking it follows *a fortiori* that there was no taking in the case at bar.

The mere fact that in the event of a major flood the set-back levee might confine to the floodway waters which might overtop the unreduced riverside levee, and thus increase the depth of the water in the floodway, cannot be made the basis of a taking. *Matthews, Trustee v. United States*, 87 C. Cls. 662, 719

(involving lands in the Birds Point-New Madrid floodway); *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24. No reduction in the height of the riverside levee may or will be made, and no taking will occur, until this proceeding is finally concluded and the Government acquires a flowage easement over petitioner's land by paying the judgment.

The petitioner urges (p. 9) that the decision of the Court of Appeals is in conflict with *Hurley v. Kincaid*, 285 U. S. 95.⁷ There Kincaid sought to enjoin work on the Boeuf floodway, contending that since his land had not been condemned he was deprived of his property without just compensation. This Court did not pass on the question of a taking and stated (p. 103) that it had "no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued." It held that Kincaid was not entitled to injunctive relief because, even *assuming* his land had been taken, he had an adequate and complete remedy at law by a

⁷ Petitioner also relies (p. 10) upon the decision of the lower courts in the *Kincaid* case, although it was reversed by this Court. The *per curiam* opinion of the Fifth Circuit (49 F. (2d) 768) simply adopts the opinion of the District Court (37 F. (2d) 602) which is not in conflict with the decision in the case at bar. Although the District Court indicated that the appropriation of flowage easements begins when the first levee works are constructed it recognized (p. 608) that the appropriation would not be consummated until the floodway was completed.

suit under the Tucker Act to recover just compensation. The portion of the opinion quoted by petitioner (p. 9) is not a dictum but clearly indicates that the Court was resorting to the familiar practice of assuming the postulate most favorable to the party seeking relief for the purpose of showing that even under such an assumption he was not entitled to it.

Petitioner cites *Jacobs v. United States*, 290 U. S. 13; *United States v. Cröss*, 243 U. S. 316; *United States v. Lynah*, 188 U. S. 445; and *Pumpelly v. Green Bay Company*, 13 Wall. 166, but his own statement of those cases (pp. 9-10) shows that they are not in point. Each involved a flooding and physical invasion of property, which cannot possibly occur in the case at bar until after the fuse-plug section is reduced. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Matthews v. United States*, 87 C. Cls. 662; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

Petitioner also intimates (p. 11) that his rights may be affected by the decision in *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6th; certiorari granted, May 15, 1939, No. 27, Oct. Term, 1939). In that case the question is whether a cause of action is stated by a complaint alleging that the United States by erecting a dike extending out into a river from one bank caused the plaintiff's land

on the opposite bank to be washed away. . Plainly the decision in that case, whichever way it goes, will have no bearing on the present case.

CONCLUSION

The decision of the Court of Appeals is plainly correct and presents no conflict of decisions. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

/ ROBERT H. JACKSON,
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SEPTEMBER 1939.

APPENDIX

THE MISSISSIPPI RIVER, FLOOD CONTROL ACT

(Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. Secs. 702a-702m)

AN ACT For the control of floods on the Mississippi River and its tributaries, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: * * * *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side

f the river contiguous to the levee at the head of
aid floodway, but nothing herein shall prevent,
ostpone, delay, or in anywise interfere with the
xecution of that part of the project on the east
de of the river, including raising, strengthening,
nd enlarging the levees on the east side of the
ver. The sum of \$325,000,000 is hereby author-
ed to be appropriated for this purpose.

* * * * *

SEC. 3. Except when authorized by the Secretary
f War upon the recommendation of the Chief of
ngineers, no money appropriated under authority
f this Act shall be expended on the construction
f any item of the project until the States or levee
istricts have given assurances satisfactory to the
ecretary of War that they will (a) maintain all
ood-control works after their completion, except
ontrolling and regulating spillway structures, in-
cluding special relief levees; maintenance includes
ormally such matters as cutting grass, removal of
eeds, local drainage, and minor repairs of main
ver levees; (b) agree to accept land turned over
o them under the provisions of section 4; (c) pro-
vide without cost to the United States, all rights
f way for levee foundations and levees on the
ain stem of the Mississippi River, between Cape
irardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest
pon the United States for any damage from or by
oods or flood waters at any place: *Provided, how-*
ever, That if in carrying out the purposes of this
et it shall be found that upon any stretch of the
anks of the Mississippi River it is impracticable
o construct levees, either because such construc-

tion is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

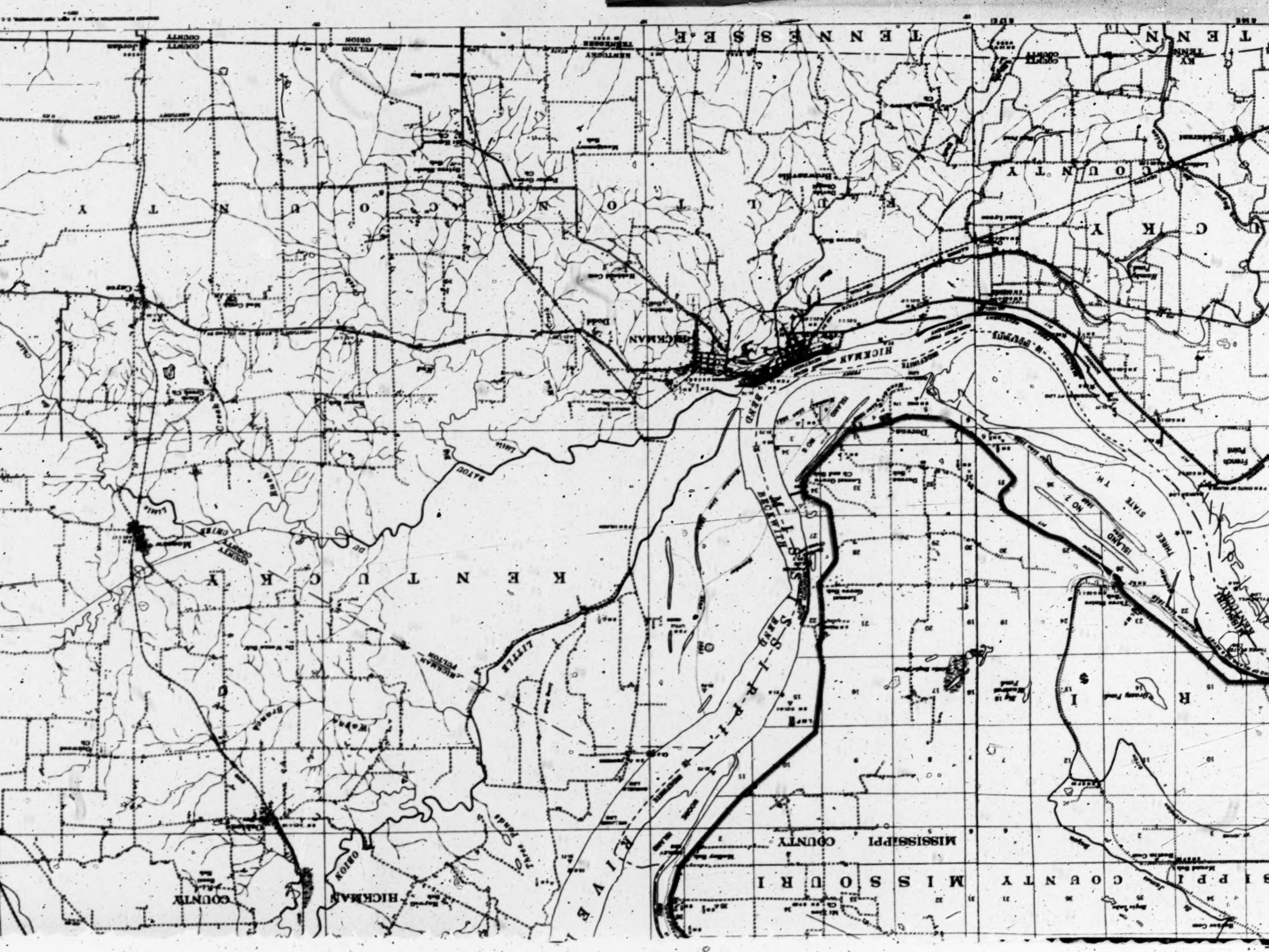
SEC. 4. The United States shall provide flowage rights for additional destructive ~~flood~~ waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

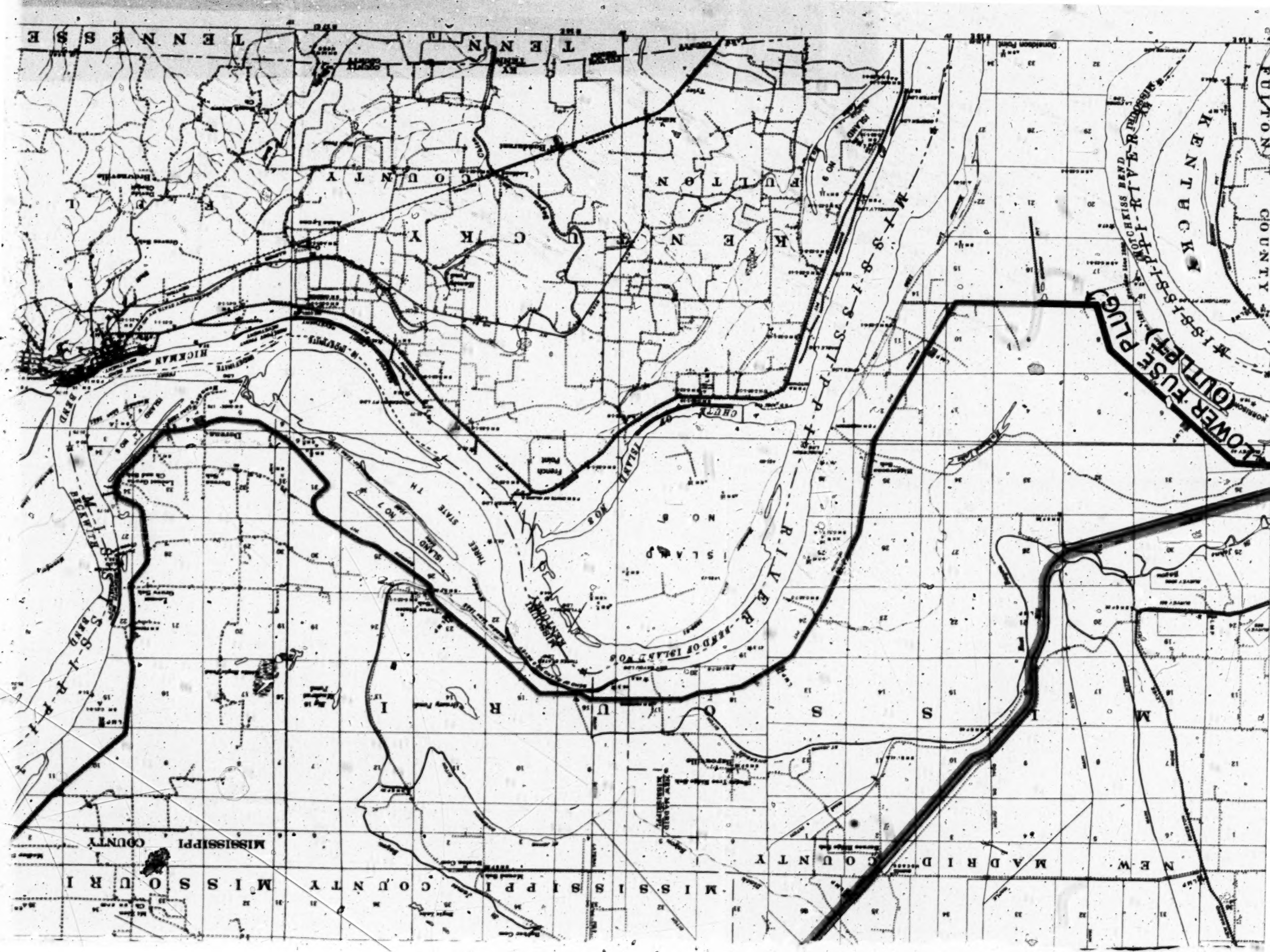
The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of

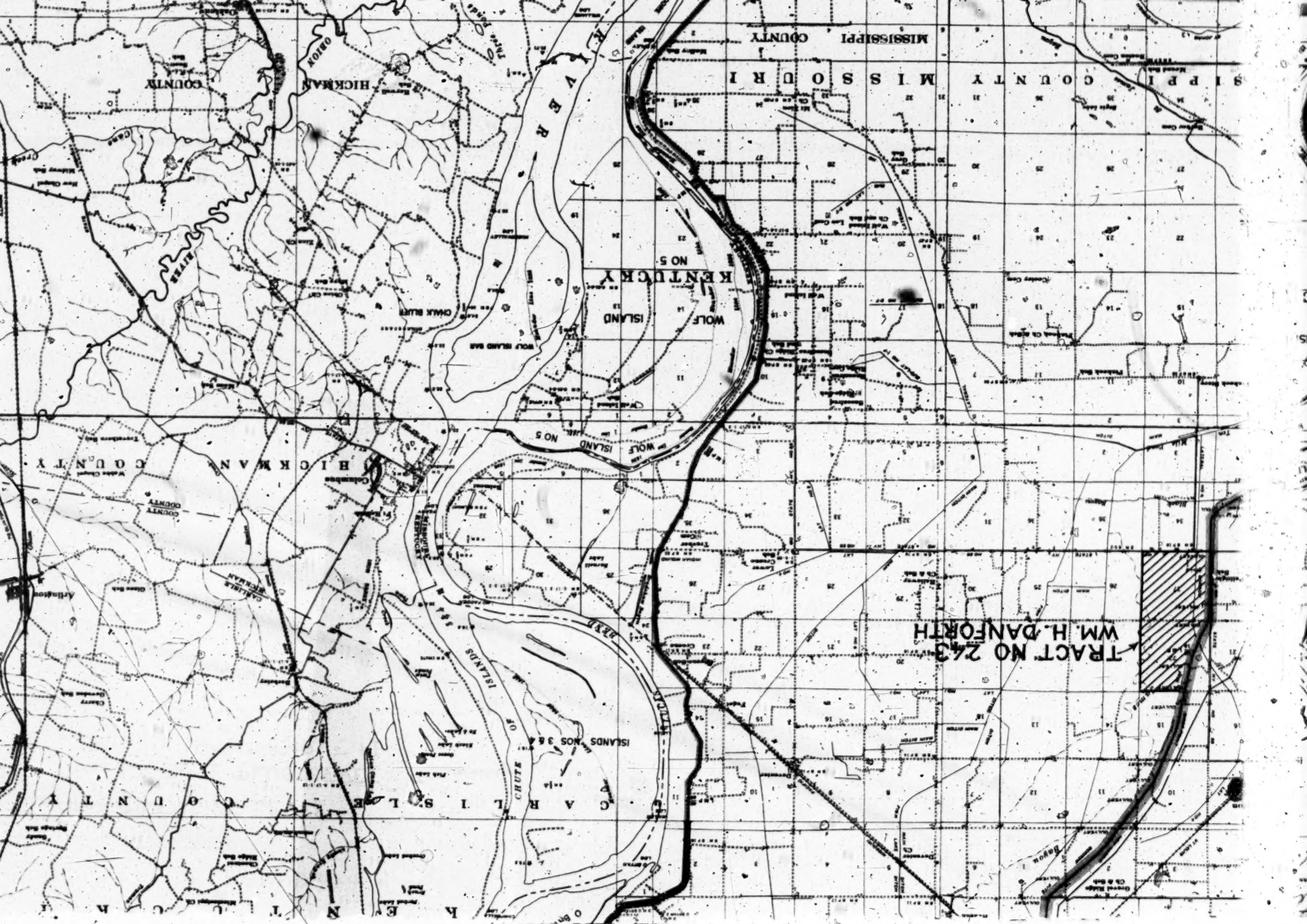
any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

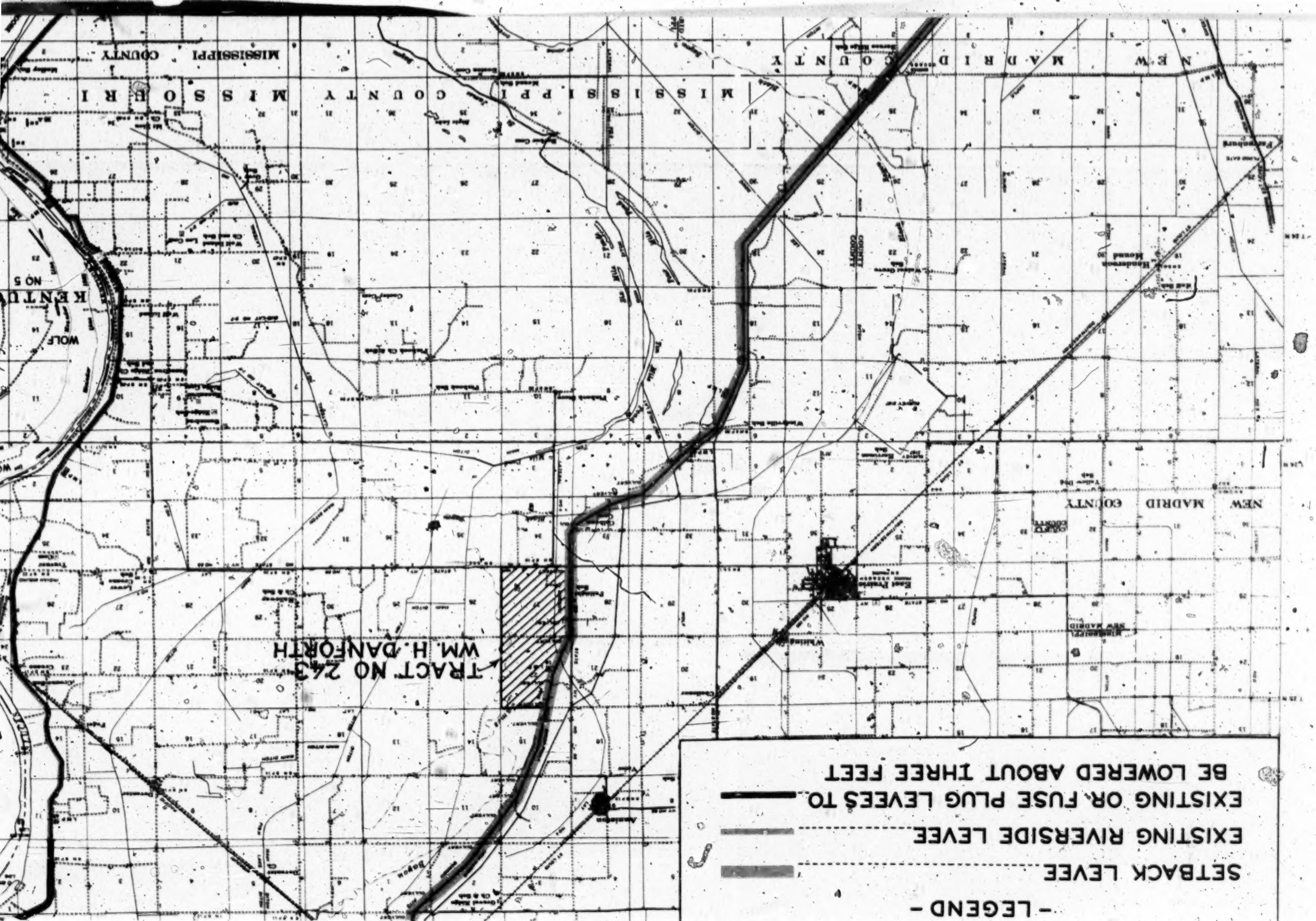
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Approved, May 15, 1928.







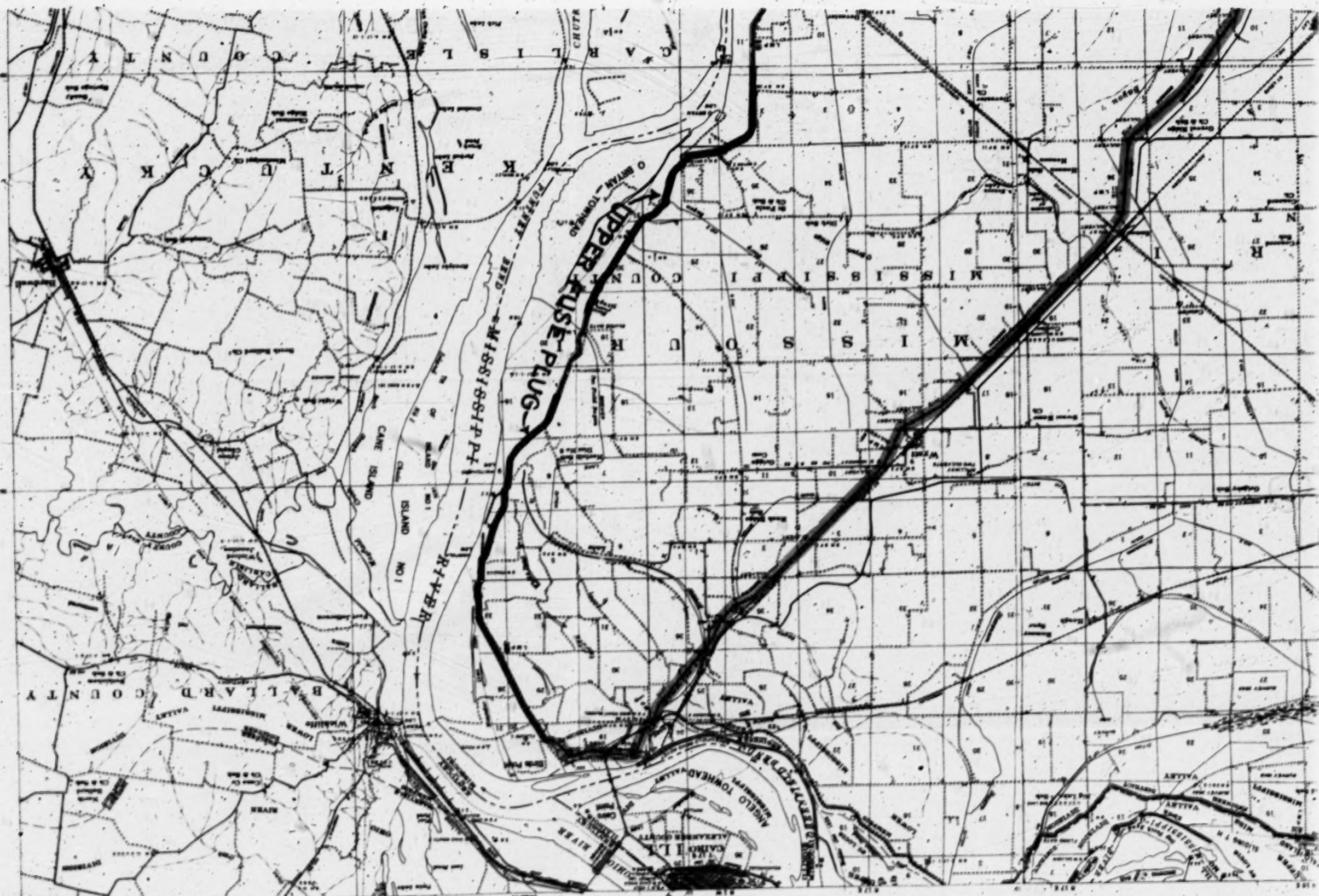


- LEGEND -

SETBACK LEVEL

EXISTING RIVERSIDE LEVEL

EXISTING OR FUSE PLUG LEVELS TO
BE LOWERED ABOUT THREE FEET



- LEGEND -

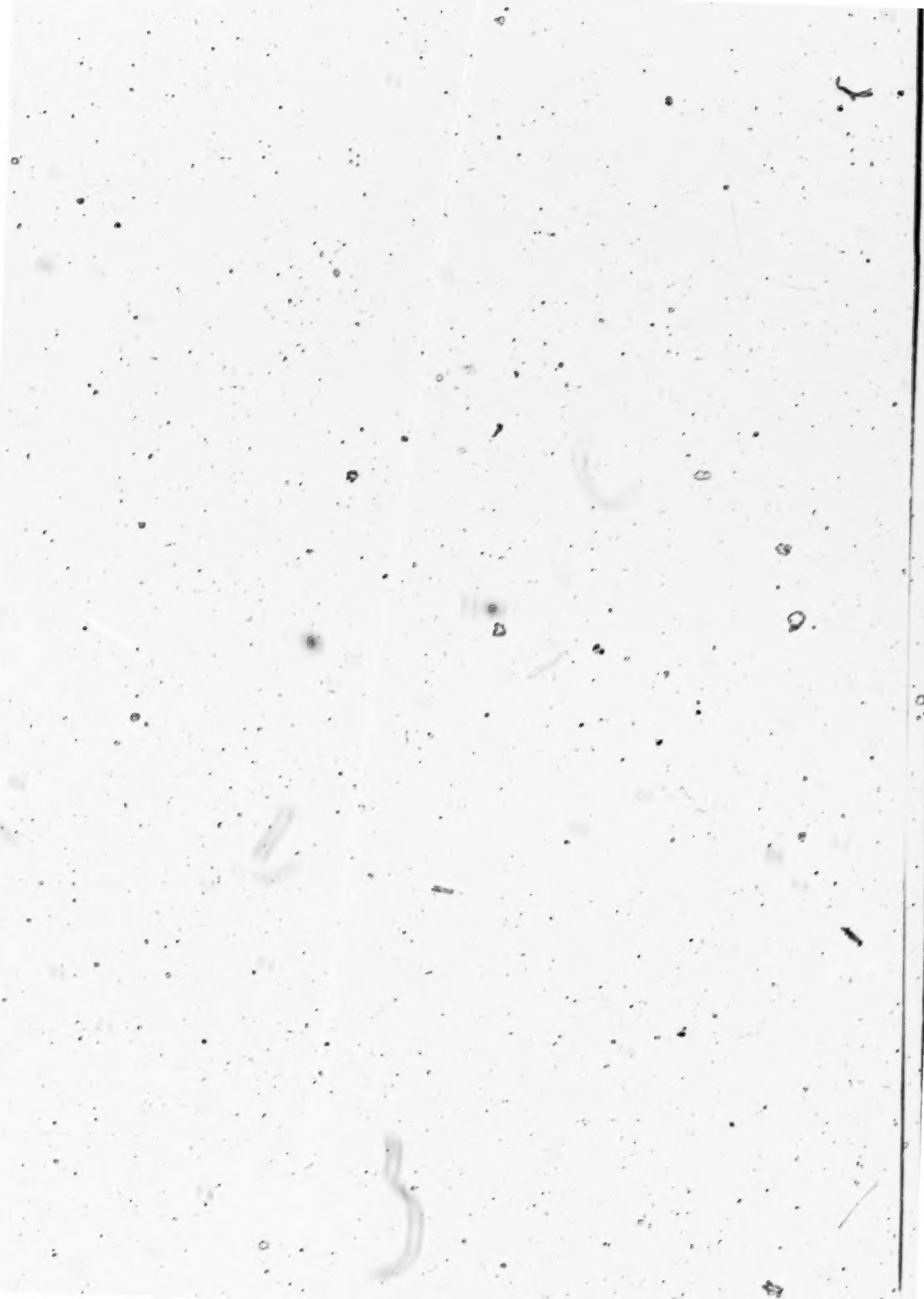
SETBACK LEVEE

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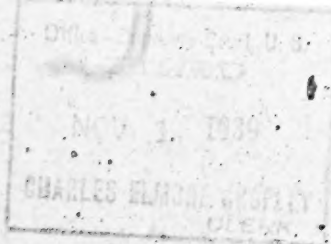
EXISTING OR FUSE PLUG LEVEES TO

A horizontal scale bar labeled "SCALE OF MILES" in bold, black, sans-serif capital letters. The scale is marked with major ticks at 0, 1, 2, and 3 miles. The numbers are placed below the line, and the text "SCALE OF MILES" is centered above the line. The bar is oriented horizontally, with 0 on the left and 3 on the right.





FILE COPY



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COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 309

WILLIAM H. DANFORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion of the district court (R. 39-41) is not reported. The two opinions of the circuit court of appeals (R. 221-229; 233-239) are reported in 102 F. 2d 5 and 105 F. 2d 318.

JURISDICTION

The judgment of the circuit court of appeals was entered July 11, 1939 (R. 239-240). Petition for a writ of certiorari was filed August 23, 1939, and was granted on October 9, 1939. The jurisdiction of this Court rests upon section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit brought by the United States to condemn a flowage easement, the condemnee may, in the absence of statutory consent, recover upon a contract which it is claimed fixed the value of the easement.

2. Whether there has yet been a taking by the Government of a flowage easement over petitioner's property, with a consequent obligation to pay interest from the date of the taking on the sum determined to be the value of the easement.

STATUTES INVOLVED

The pertinent provisions of the Act of March 3, 1797, c. 20, 1 Stat. 514, R. S. sec. 951, 28 U. S. C. sec. 774, and of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. secs. 702a-702m, are set out in the Appendix *infra*, pp. 44-48.

STATEMENT

1. *The proceedings and the contract.*—Acting pursuant to section 4 of the Flood Control Act of May 15, 1928, *infra*, p. 47, the Secretary of War authorized the making of offers for the acquisition of flowage rights in the Birds Point-New Madrid Floodway (R. 69). On January 14, 1932, the District Engineer addressed a letter to the petitioner, the pertinent parts of which are as follows (R. 69):

I am * * * directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and

98/100 Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses. * * *

This offer was accepted by the petitioner (R. 69) prior to its expiration (R. 171). Shortly thereafter the War Department ascertained that a number of its offers were excessive, and the Secretary of War directed the withdrawal of 138 such offers, including this and 24 others which had been accepted (R. 137-155). On July 8, 1932, the District Engineer wrote to the petitioner (R. 185-186), saying:

It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the Court. It is not feasible for this office to recommend for an agreed verdict prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the Court, this office is confident that just compensation will be awarded in all cases.

On September 25, 1933, the Government instituted this condemnation proceeding in the United States District Court for the Eastern District of Missouri (R. 2-10). Pursuant to section 4 of the Act of May 15, 1928, *infra*, p. 47, the court appointed commissioners to appraise the value of the flowage easements (R. 11-15). The commissioners reported an award of \$20,409.90 (R. 15-16). Both parties filed exceptions (R. 16-20).

Petitioner then filed an answer and a counterclaim asking the court for judgment against the United States in the sum of \$31,681.98 with interest (R. 21-25). On motion of the Government (R. 27-32) the answer and counterclaim were stricken (R. 39-41).

The Government's exceptions to the award were sustained (R. 51) because the amount was too high (R. 217) and new commissioners were appointed (R. 53-54). They reported a value of \$8,428.25 (R. 54-56) which, on the exceptions of petitioner (R. 57-61), was set aside because inadequate (R. 61) and new commissioners were appointed (R. 62-63). These commissioners returned an award fixing just compensation at \$17,921.70 (R. 63-64). Exceptions of both parties (R. 65-72) were overruled (R. 73-79) and on April 23, 1937, the district court entered judgment that the United States will acquire the flowage easement prayed for in the petition when it pays that amount into the registry of the court (R. 78-79). Motions for new trial by

both parties (R. 80-89) were overruled (R. 92) and petitioner appealed (R. 92-101).

2. *The date of taking, if any, of a flowage easement.*—The Flood Control Act adopted by reference the Jadwin plan for flood control in the Mississippi valley, H. Doc. No. 90, 70th Cong., 1st sess. (1927). That plan recommended (pars. 13, 124-126) the construction of floodways in several of the basins of the Mississippi valley to relieve the main stem of the river of its excess floodwaters. One of these floodways was to be along the west side of the Mississippi River between Birds Point and New Madrid, Missouri.¹ This was to be accomplished by constructing between those points a second or set-back levee several miles west of the existing riverside levee and by reducing the height of an eleven-mile portion of the riverside levee south of Birds Point from a grade equivalent to about 58 feet on the Cairo gauge to one equivalent to 55 feet on that gauge. This reduced portion was to be known as the upper fuse-plug section. Provision was also made for a lower fuse-plug section in the portion of the riverside levee near New Madrid.

¹ A map of this floodway and the land involved in the present proceeding is attached to the inside back cover of this brief.

The flood-control work for the Mississippi valley as a whole is discussed in considerable detail in the supplemental brief for the petitioner in *United States v. Sponenbarger*, No. 72, this Term.

When the floodway is completed and the river-side levee is reduced the upper fuse-plug section will admit water from the Mississippi River when the flood stage exceeds 55 feet on the Cairo gauge. The set-back levee will confine this diverted water to the floodway territory and will direct it to the south, where it will return to the Mississippi at the lower fuse-plug section, where there is a gap in the levee system to permit complete drainage (R. 109-112). Petitioner's land (Tract No. 243) is situated in the floodway immediately east of the set-back levee,² approximately halfway between Birds Point and New Madrid (R. 7).

Construction work on the set-back levee began on October 21, 1929, and was complete on October 31, 1932, except that a gap where the Missouri Pacific Railroad crossed the levee had not been closed.³ The riverside levee has been maintained at its original height of about 58 feet, and the upper fuse-plug, which is designed to admit water into the floodway, has not yet been created since the necessary flowage easements have not been acquired (R. 111).

In January 1937 the Mississippi River in this stretch attained its highest flood stage in recorded

² No part of the set-back levee has been or is to be built on the land involved in this proceeding. Certain lands of petitioner on which the set-back levee was built were condemned in a separate proceeding (Pet. Br. 5, Pet. 34-41).

³ This gap was still open at the time of the trial (R. 195-196), but has since been closed.

history (R. 191). On January 24 Colonel Reybold, the officer in charge of Memphis Engineers District No. 1, directed Major Burdick to proceed to the area and place the Birds Point-New Madrid Floodway in operation (R. 196-197, 199). These instructions were issued by Colonel Reybold without orders from any of his superiors (R. 200).

On the morning of January 25 the pressure of the floodwaters opened Natural Crevasse No. 1 in the riverside levee below the upper fuse-plug section, seven miles due east of petitioner's land (R. 192, 193). Water was trickling over the levee when, before noon of the same day, Major Burdick created Artificial Crevasse No. 1 by twice dynamiting the northern portion of the upper fuse-plug section in the vicinity of levee milepost 34 (R. 201-202), fifteen miles northeast of petitioner's land (R. 192). In the late afternoon of that day Artificial Crevasse No. 2 was created near levee milepost 38 (R. 201-202), approximately in the middle of the upper fuse-plug section and about 10 miles from petitioner's land (see map). The next morning, January 26, Natural Crevasse No. 2 developed in the riverside levee less than a mile south of Natural Crevasse No. 1. That afternoon Natural Crevasse No. 3 went into operation.⁴

⁴ At approximately the same time additional dynamiting resulted in Artificial Crevasse No. 3 in the southern portion of the upper fuse-plug section. The record in the case at bar is incomplete and does not reveal this fact. See *Mathews v. United States*, 87 C. Cls. 662, 701 (1938).

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On January 30 or 31, Natural Crevasse No. 4 was cut through by wave action on the inside of the floodway and then admitted water from the river (R. 192).*

The petitioner's property was separated from all of the artificial crevasses by a large natural ridge (O'Bryan's Ridge) and by the embankment of the Missouri Pacific Railroad running between Crosno and the opening in the levee near Samos (R. 192). Both of these had a retarding influence on the flow of the water from the artificial crevasses in the initial stages (R. 192). A witness for petitioner testified that the flow from each of the first two natural crevasses was greater and heavier than the flow from Artificial Crevasse No. 1 and that the water from Natural Crevasse No. 1 probably reached the petitioner's land before the water from the artificial crevasse because the southward flow from the latter would have been arrested until the water filled the basin created by O'Bryan's Ridge and the railroad embankment (R. 193).⁵

The flooding of petitioner's land during the 1937 flood, like that of all other land in the vicinity, would have occurred regardless of the floodway project and even if the levee had not been artificially crevassed (R. 191). The waters, if confined (that is, if there had been neither natural nor arti-

* Compare the *Matthews* case (87 C. Cls. 662, 701) where the court found that at 3:55 p. m., January 26, the water from the artificial crevasses had reached the railroad embankment and had *not* passed over it to the south.

ficial crevassing), would have reached a stage of 61½ or 62 feet on the Cairo gauge and would have overtopped the riverside levee even with extraordinary high-water maintenance (R. 190, 191). The set-back levee in no way contributed to the occurrence of the flood; its sole effect was to confine to the floodway those waters which would have otherwise passed to the west (R. 190, 191). The petitioner's witness estimated that this confinement increased the depth of the water by about five to six feet and would result in increased damage to buildings (R. 190, 191). There is no evidence in the record to show that this estimated increase in depth during the 1937 flood did actually cause any damage to petitioner's property which would not otherwise have occurred.

After the flood subsided, orders were given to restore the riverside levee, including the upper fuse-plug section, to its previous height (R. 200), and this work has been completed.

3. *Action of the circuit court of appeals.*—The circuit court of appeals in its first opinion (R. 221-229) upheld the district court in denying petitioner recovery on the contract, but held that a taking had occurred on October 21, 1929, when construction work on the set-back levee was begun, and modified the judgment so as to include interest on the award from that date. The Government obtained a rehearing (R. 230-233) and, in its second opinion (R. 233-239), the court held that there has

as yet been no taking of a flowage easement over petitioner's land. Accordingly, the judgment of the district court was affirmed without modification (R. 239-240).

SUMMARY OF ARGUMENT

I

In the present condemnation proceeding the petitioner, in a pleading denominated an answer and counterclaim, attempted to bring suit against the United States upon a contract and recover a judgment in the sum of \$31,681.98 and interest. *Wachovia Bank & Trust Co. v. United States*, 98 F. 2d 609 (C. C. A. 4), was correctly decided but has no bearing on the jurisdictional question here presented. It is a rudimentary principle that the United States cannot be sued without its consent, either by direct suit or by counterclaim.

A. Where the United States institutes a condemnation suit the condemnee may not litigate therein causes of action against the United States unless permitted by statute. Neither the Flood Control Act, pursuant to which this proceeding was brought, nor any other statute confers jurisdiction on the district court to adjudicate petitioner's contract claim. Petitioner's claim for \$31,681.98 exceeds the jurisdictional limitation of \$10,000 imposed on the district courts by the Tucker Act, even if the Tucker Act permits any recovery of demands upon counterclaims.

B. Petitioner relies upon a line of admiralty cases culminating in *United States v. The Thekla*, 266 U. S. 328, 339-340, which held that a plaintiff sovereign so far takes the position of a private suitor as to become subject to an affirmative judgment. The doctrine of the admiralty cases has never been applied outside of that field except to permit recoupment or set-off not exceeding the amount of the Government's claim. These cases do not help petitioner because no claim is asserted to which recoupment or set-off could apply. Furthermore, this being a condemnation proceeding, the very foundation upon which the admiralty doctrine rests is lacking because the United States enters court as a sovereign (*Kohl v. United States*, 91 U. S. 367, 371, 372) and not as a private suitor asserting a claim.

C. Even if the district court had jurisdiction to adjudicate petitioner's contract claim he would not be entitled to recover interest because the contract did not provide for interest. *Smyth v. United States*, 302 U. S. 329, 353; *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304.

II

The courts below correctly held that there has as yet been no taking of a flowage easement over petitioner's property and that he is therefore entitled to no interest on the award.

A. There was no taking on October 21, 1929, when the Government began work on the set-back

levee. Nothing had been done at that time to increase the possibility that petitioner's land might be overflowed since the riverside levee was maintained at its original height and the upper fuse-plug section which was designed to divert water to the floodway had not been created. Under the mandate of section 1 of the Flood Control Act the riverside levee could not have been reduced at that time because the floodway was not completed.

Petitioner has not been deprived of his right to raise and improve the riverside levee. Title to the riverside levee still remains in the local levee district and the Flood Control Act does not provide for control by the United States, at least prior to acquisition of the flowage rights. Furthermore, even if it could be said that the Government has deprived the petitioner of his right to improve and raise the levee, this would impose no liability on the Government. *Matthews v. United States*, 87 C. Cls. 662, 718 (1938); cf. *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24.

B. There was no taking on October 31, 1932, when work on the set-back levee was 98.9% complete. The riverside levee was still unaltered. Section 1 of the Flood Control Act still prevented the reduction of the riverside levee because the acquisition of flowage easements required for this floodway by section 4 had not been completed.

No taking can be predicted upon the fact that in 1932 the completed portion of the set-back levee would confine to the floodway waters which might

have overtopped the unreduced riverside levee. Section 4 of the Act did not contemplate payment for the confining effect of the set-back levee upon waters which might overtop the riverside levee since that would constitute only consequential damage and not "additional destructive waters that will pass by reason of diversions from the main channel of the Mississippi River." *Matthews v. United States*, 87 C. Cls. 662, 719 (1938); see *Sanguinetti v. United States*, 264 U. S. 146.

C. In January 1937 the Mississippi River in this stretch attained its highest flood stage in recorded history. The pressure of the water opened natural crevasses in the riverside levee and thereafter officers of the United States Army artificially crevassed the upper fuse-plug section. This action, however necessary as a practical matter, was unauthorized and contrary to the mandate of section 1 of the Flood Control Act. No taking can be predicated upon these unauthorized acts. *Hooe v. United States*, 218 U. S. 322; *Hughes v. United States*, 230 U. S. 24. After the flood subsided the dynamited portions of the levee were restored to their previous height. It is clear that petitioner's land would have been flooded in 1937 regardless of the floodway project and even if the levee had not been artificially crevassed.

D. No taking had occurred prior to the entry of judgment. The entry of judgment did not constitute a taking, *Barnidge v. United States*, 101 F.

2d 295, 298 (C. C. A. 8), and, since the fuse-plug section cannot be reduced until the necessary flowage easements are acquired, no taking will occur until the judgment is paid.

ARGUMENT

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO ADJUDICATE PETITIONER'S CONTRACT CLAIM

In the present case the petitioner, in a pleading denominated an answer and counterclaim, attempted to bring suit against the United States upon a contract, asking for judgment against the United States in the sum of \$31,681.98 and interest (R. 21-25). Similar relief had been sought by way of exceptions to the Commissioners' award (R. 19, 33-35). After the pleading was stricken out on motion of the United States (R. 39), the petitioner repeatedly asked for this same relief (R. 41-46, 56, 57-61, 68-72, 84-89, 113). The bulk of the testimony offered by petitioner at the trial was directed to proving that the Government had entered into and had breached a binding contract to purchase the flowage rights for \$31,681.98 (R. 113-186).

In *Wachovia Bank & Trust Co. v. United States*, 98 F. 2d 609, upon which petitioner rests his claim (Br. 44-46), the Circuit Court of Appeals for the Fourth Circuit held that the contract price fixed for land to be acquired by condemnation was bind-

ing on the parties to the contract when the contract was set up by the United States in the condemnation proceedings. The Government does not in any way attack the validity of that decision, which it believes to be entirely correct. But the instant case presents the converse of the *Wachovia* case, for here the United States has disaffirmed the contract and the petitioner is seeking to enforce it in the district court.

It is conceded (Br. 49) that if no condemnation proceedings had been instituted petitioner's only remedy would be in the Court of Claims. But, petitioner urges, the institution by the United States of this condemnation proceeding so enlarged the jurisdiction of the district court as to enable it at the petitioner's instance to enforce the contract against the United States. The relevance of the contract, or the evidentiary weight to be given it, as a measure of the value of the easement is not in issue; the petitioner pitches his case solely on the proposition that he can enforce the contract (Pet. 8-9, 12-13; Br. 12, 41-50).

It is a rudimentary principle that the United States cannot be sued without its consent, either by direct suit or by counterclaim against it. *Nasqui Smelting Works v. United States*, 266 U. S. 101, 106; *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 504-505; *North Dakota-Montana W. G. Ass'n v. United States*, 66 F. 2d 573, 577-578 (C. C. A. 8), certiorari denied, 291

U. S. 672; *Owen v. United States*, 8 F. 2d 992, 993 (C. C. A. 5). We shall show that no such consent has been given.

A. NO STATUTE CONFERS JURISDICTION

1. Where the United States institutes condemnation proceedings, the condemnee may not litigate therein causes of action against the United States unless the statute in question permits him to do so. *United States v. Shingle*, 91 F. 2d 85, 89 (C. C. A. 9), certiorari denied, 302 U. S. 746; *United States v. John Ii Estate*, 91 F. 2d 93, 94 (C. C. A. 9), certiorari denied, 302 U. S. 746; 2 *Nichols*, Eminent Domain (2d ed.) sec. 425, p. 1121. There is no claim that the Flood Control Act of May 15, 1928, *infra*, pp. 44-48, confers any jurisdiction upon the district court to entertain a counterclaim against the United States.

2. The Tucker Act, Judicial Code, sec. 24 (20), 28 U. S. C. sec. 41 (20), does not confer jurisdiction to adjudicate petitioner's counterclaim in this proceeding, for it limits the jurisdiction of the district courts to claims less than \$10,000 in amount.* *North Dakota-Montana W. G. Ass'n v. United States*, 66 F. 2d 573, 577-578 (C. C. A. 8), certiorari denied, 291 U. S. 672; *Owen v. United*

* Compare *United States v. Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765, in which the Circuit Court of Appeals reversed an affirmative judgment against the United States on the ground that the Tucker Act does not permit recovery of demands upon counterclaims but refers only to original suits.

States, 8 F. 2d 992 (C. C. A. 5). In the latter case, a condemnation proceeding, it was held (p. 993):

What is undertaken by the landowners here is to collect damages by cross-action. But, without its consent, the government cannot be sued, nor can judgment be rendered against it, even though it is indebted on striking a balance of demands. *De Groot v. United States*, 5 Wall. 419, 431, 18 L. Ed. 700. Such consent is not given by Judicial Code, sec. 24, par. 20 (Comp. St. sec. 991), which confers upon District Courts of the United States jurisdiction of claims not exceeding \$10,000, because the claim here asserted is for \$20,000, and could be asserted, if at all, only in the Court of Claims.

Since the petitioner's claim is for \$31,681.98 it is clear that the Tucker Act does not confer jurisdiction upon the district court.

3. Rule 13 of the Federal Rules of Civil Procedure provides a liberal counterclaim practice but expressly provides, in subdivision (a) that "these rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States." See, also, Rule 81 (a) (7).

B. JURISDICTION CANNOT REST UPON THE STATUS OF THE UNITED STATES AS PLAINTIFF

United States v. The Thekla, 266 U. S. 328, and the line of admiralty decisions culminating in that

case, upon which petitioner relies (Br. 41-42, 43),⁷ are not in point. *The Thekla* involved a collision between a vessel under charter to the United States and the Norwegian barque *Thekla*. The owners of the former libelled the *Thekla* and her owners filed a cross libel. The United States on its own motion became a party libellant and stood on the owner's libel. The libel and cross libel were consolidated and proceeded as one cause of which the subject matter was held to be the collision. The trial court found that the Government's vessel alone was at fault and a decree for damages, interest, and costs was entered against the United States. This Court affirmed. It said (pp. 339-340):

When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

But it is to be noted that the Court expressly stated (p. 339) that it did not "in any way" qualify its decision in *Nassau Smelting Works v. United States*, 266 U. S. 101, decided only two weeks before, in which it was held (p. 106):

The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a

⁷ *The Nuestra Señora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453; *The Gloria*, 286 Fed. 188 (S. D. N. Y.); *The Barbara Cates*, 17 F. Supp. 241 (E. D. Pa.).

counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. * * *

Only in admiralty, where the courts are constantly confronted with the necessity of determining in one action intricate problems of liability in prize and collision cases, has the doctrine of *The Thekla* been given the scope of permitting the recovery of an affirmative judgment against the United States. Outside of that field it has consistently been held that an affirmative judgment may not be recovered against a sovereign. *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9), certiorari denied, 264 U. S. 582; *Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic v. Inland Nav. Co.*, 263 Fed. 410 (E. D. Mo.); see *Reeside v. Walker*, 11 How. 272, 290-291.

Petitioner relies (Br. 42, 43-44) upon *Bull v. United States*, 295 U. S. 247; *United States v. Stephanidis*, 41 F. 2d 958 (E. D. N. Y.), affirmed on another ground, 47 F. 2d 554 (C. C. A. 2); *United States v. National City Bank*, 83 F. 2d 236 (C. C. A. 2). These cases, although there is rather broader language in the *National City Bank* case, are simply further illustration of the fact that outside of admiralty the doctrine has been limited to allowing recoupments and set-offs not exceeding the Government's claim. Here the United States

is making no claim against the petitioner which could be reduced by a recoupment or set-off.

Petitioner also cites (Br. 42) *United States v. Wilkins*, 6 Wheat. 135; *Gratiot v. United States*, 15 Pet. 336; *United States v. Bank of Metropolis*, 15 Pet. 377. All three of these cases involved set-offs which were authorized by the Act of March 3, 1797, *infra*, p. 44. This statute is not applicable to petitioner's claim since it has not been presented to the General Accounting Office as the Act requires and because in this proceeding the United States makes no demand against petitioner to which a credit or set-off could apply. In any event, none of the cases cited allowed an affirmative judgment against the United States and it is settled that the statute does not authorize such a judgment. *De Groot v. United States*, 5 Wall. 419, 431; *United States v. Eckford*, 6 Wall. 484; *Schaumborg v. United States*, 103 U. S. 667; *In re Clayton Magazines, Inc.*, 77 F. 2d 852, 854 (C. C. A. 2); *United States v. Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765; see *United States v. Skinner & Eddy Corporation*, 35 F. 2d 889, 898-901 (C. C. A. 9), certiorari dismissed, 281 U. S. 770.

In short, the doctrine of the admiralty cases which permits an affirmative judgment against the United States when it enters court as a private suitor to assert a claim has never been applied outside of that field except to permit recoupment or set-off not exceeding the amount of the Govern-

ment's claim. These cases, which represent the farthest extension of the admiralty doctrine, do not help petitioner because no claim is asserted to which recoupment or set-off could apply.

Finally, in the case at bar the United States did not, as in *The Thekla*, come into court "to assert a claim," and did not take "the position of a private suitor." It came into court as a sovereign exercising the right of eminent domain, an essential attribute of sovereignty. *Kohl v. United States*, 91 U. S. 367, 371, 372. Its action in doing so gives rise to no implication that it consented to anything other than that just compensation be determined. The condemnation proceeding thus affords no basis for an implication that the Government has "laid aside its protective cloak of immunity from suit" (R. 227).

C. PETITIONER COULD NOT RECOVER INTEREST ON THE CONTRACT

Even if the district court had jurisdiction to adjudicate petitioner's counterclaim based on the contract, he would not be entitled to recover interest. It is well settled that the United States is not liable for interest on a contract claim unless either the contract itself or a statute shows a contrary intention. *Smyth v. United States*, 302 U. S. 329, 353; *United States ex rel. Angarica v. Bayard*, 127 U. S. 251; *United States v. North Carolina*, 136 U. S. 211; *United States v. North American Co.*, 253 U. S. 330, 336; *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304. Neither is the case here.

II

THE UNITED STATES HAS NOT AS YET TAKEN A FLOWAGE
EASEMENT OVER PETITIONER'S PROPERTY

Both the district court and the court of appeals denied petitioner recovery on the contract but the court of appeals in its first opinion (R. 228-229) held that a taking had occurred on October 21, 1929, and awarded interest from that date as a part of just compensation. The Government obtained a rehearing (R. 230-233) and, in its second opinion (R. 233-239), the court held that there has as yet been no taking of a flowage easement over petitioner's land. This holding, we submit, is entirely correct.

In view of the petitioner's contentions (Br. 22), and since the factual situation changed from time to time, the Government's argument can best be presented by a chronological discussion centering on each of the possibly significant dates.*

A. THERE WAS NO TAKING ON THE DATE WHEN THE WORK BEGAN

On October 21, 1929, the Government began construction of the set-back levee (R. 195). This was the first work done on the proposed floodway proj-

* The petitioner asserts (Br. 22), but without conviction (Br. 40), that when the Flood Control Act which adopted the Jadwin Plan became law on May 15, 1928, it constituted a taking of a flowage easement over his land. However, the mere adoption of a plan obviously does not constitute a taking. *Willink v. United States*, 240 U. S. 572; *Bauman v. Ross*, 167 U. S. 548. See Brief for petitioner in *United States v. Sponenbarger*, No. 72, this Term, pp. 33-38.

ect. There is nothing in the record to indicate what was actually done on that date. However, the existing riverside levee had not been altered and thus it afforded to the petitioner's land the same protection it had formerly enjoyed (R. 110-111).

1. *Nothing had been done at that time to increase the possibility of overflow.*—Since 1914 the riverside levee between Birds Point and New Madrid had been maintained at a height of approximately 58 feet on the Cairo gauge (R. 189-190). That part of the Jadwin Plan which relates to this floodway contemplates the reduction of an eleven-mile portion of this levee, known as the upper fuse-plug section, to a height of 55 feet.^a H. Doc. 90, 70th Cong., 1st sess., p. 29 (1927). Only after this is done will the possibility of overflow of lands within this floodway be increased, since the reduced levee will admit waters to the floodway when the Mississippi is at a 55-foot stage instead of affording protection up to 58 feet, as the existing riverside levee does.

On October 21, 1929, the upper fuse-plug section had not been reduced and the riverside levee had not been altered in any way (R. 111). Thus it is clear that nothing had been done at that time to increase the frequency with which petitioner's land might be flooded.

^a The levee for about one mile in the middle of this eleven-mile stretch will be retained at the 58-foot level (R. 190).

Furthermore the Flood Control Act expressly prohibited any act at that time which would have subjected petitioner's land to more frequent overflow. Section 1 provides—

That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river.

—The flood protection which the Danforth tract enjoyed was afforded by the levee on the west side of the river; the Act required that the land continue to have this protection until the floodway was completed. A holding that a taking had occurred on October 21, 1929, the day the very first work was done, would therefore be wholly inconsistent with the clear mandate of the Flood Control Act.

2. *Nothing had been done to increase the depth, duration, or velocity of overflow.*—There was testimony to the effect that the completed set-back levee would increase the depth, duration, and velocity of overflow by confining to the floodway water which would otherwise have passed to the west (R. 190-191). It will subsequently be shown

that no taking can be predicated solely upon the confining effects of the completed set-back levee (*infra*, pp. 33-36). At this time it is sufficient to point out that the result of the first day's work could not have confined any floodwaters which might have overtopped the unreduced riverside levee.

3. *The petitioner has not been deprived of his right to protect his land against floods.*—The petitioner contends that he was deprived of his right to raise and improve the riverside levee (Br. 22-24, 37-38). But there is no showing in the record that the United States has taken title to the riverside levee, or that it has prevented the landowners from raising that levee to protect their land. As a matter of fact, title to the riverside levee remains in the levee district which owned it before the Flood Control Act was adopted, and the United States has not taken any step to prevent the landowners from raising the levee if they see fit.

The Flood Control Act neither specifically nor by implication deprives the landowners of the right to raise the riverside levee, at least up to the time when the fuse-plug section is reduced to fifty-five feet. The Jadwin Report had urged (par. 120) that the United States be given such control. The Flood Control Bill as introduced (S. 3740, 70th Cong., 1st sess.) provided in section 9 that no levee or other structure could be built or altered unless approved by the Chief of Engineers and authorized by the Secretary of War. When

the bill was being considered on the floor of the House of Representatives these provisions of section 9 were stricken (69 Cong. Rec. 7114-7115).

The provisions of section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; 33 U. S. C. sec. 408), which forbid interference with levees and other structures and which are made applicable by section 9 of the 1928 Act, apply only to levees and other structures *built by the United States*, and consequently have no application to this levee, which was built by local interests. The restoration of the portions of the riverside levee unlawfully dynamited during the 1937 flood (see pp. 40-42, *infra*) obviously did not transform the entire levee, as petitioner contends (Br. 27); or even the dynamited portions into a levee "built by the United States" within the meaning of the 1899 Act.

It may reasonably be inferred that after the fuse-plug section is reduced to the 55-foot level the landowners will not have the right to raise it.¹⁰ But the loss of that right is one of the very things for which the appellant will receive compensation in this proceeding. As yet no reduction has been made and

¹⁰ The flowage rights have been purchased or condemned on the basis of a levee cut down to the 55-foot level. The Government, when they have all been acquired, will have a property right against each piece of land to maintain the levee at that reduced level. An attempt on the part of the landowners to rebuild the levee could, therefore, then be enjoined or made nugatory by a subsequent removal of the earth.

none will be made until after the payment of the judgment.

Furthermore, even if it could be said that the Government has now deprived the petitioner of his right to improve and raise the levee, this would not constitute a taking. In *Matthews v. United States*, 87 C. Cls. 662 (1938), the Court of Claims, with reference to such a claim in this very floodway, stated (p. 718):

The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the riverside levee might be constructed—namely, at 58 feet, and plaintiff cannot sustain a taking because of this feature of the Flood Control Act nor from the fact, if it were a fact, that the United States will not maintain or assist in maintaining the riverside levee at its present height of 58 feet.

The same holding is implicit in the decisions of this Court in *Jackson v. United States*, 230 U. S. 1; and *Hughes v. United States*, 230 U. S. 24. See Brief for Petitioner in *United States v. Sponenbarger*, pp. 41-42.

4. *The cases relied upon by petitioner are not in point.*—The petitioner places considerable reliance on *Hurley v. Kincaid*, 285 U. S. 95 (Br. 24, 34-35). There Kincaid sought to enjoin work on the Boeuf Floodway, contending that since his land, which was located in the proposed floodway, had not been condemned, the construction of the

floodway would deprive him of his property without just compensation. The Court stated (p. 103):

We have no occasion to determine any of the controverted issues of fact or any of the provisions of substantive law which have been argued * * *. *We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized.* [Italics supplied.]

Clearly, Mr. Justice Brandeis was resorting to the familiar practice of assuming the postulates most favorable to the party seeking relief for the purpose of showing that even under such assumptions he was not entitled to it.¹¹

¹¹ Petitioner also relies (Br. 34-35) upon the decision of the lower courts in the *Kincaid* case, although reversed by this Court. The *per curiam* opinion of the Fifth Circuit (49 F. 2d 768) simply adopts the opinion of the district court (37 F. 2d 602). Petitioner sets out (Br. 35) a portion of that opinion to the effect that the appropriation of flowage rights begins with the construction of the first levee works which are intended to direct the water upon the land. But the court indicated that that appropriation only *begins* with the commencing of construction and said (p. 608):

"When they [the levee works] will have been completed; the appropriation will be complete."

Since an incomplete taking is no taking, the opinion of the district court, if authority for anything, is authority that there can be no taking prior to completion of the work which injures the landowner.

Petitioner cites *Jacobs v. United States*, 290 U. S. 13; *United States v. Cress*, 243 U. S. 316; *United States v. Lynah*, 188 U. S. 445; *Pumpelly v. Green Bay Company*, 13 Wall. 166; *United States v. Chicago, B. & Q. R. Co.*, 82 F. 2d 131 (C. C. A. 8); and *United States v. Chicago, B. & Q. R. Co.*, 90 F. 2d 161 (C. C. A. 7), but his own statement^o of those cases (Br. 27-32, 38-39) shows that they are not in point. Each involved a flooding and physical invasion of property, which cannot possibly occur in the case at bar until after the fuse-plug section is reduced. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Matthews v. United States*, 87 C. Cls. 662; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

5. *The implications of petitioner's position.*—A holding that a taking occurred on October 21, 1929, would mean that the Government became liable for interest on the day when the first spadeful of earth was turned. Moreover, while the date of taking is important, as fixing the period for which interest must be paid, it is possibly even more important as determining the time when the Government might irrevocably become bound to make just compensation. A holding that a taking occurred on October 21, 1929, would certainly lend support to a contention that the Government became liable on that date to make compensation for flowage ease-

ments over lands in the floodway. If that is so, even if the Government had not instituted condemnation proceedings, compensation could have been recovered in an action against it under the Tucker Act on an implied contract. *Hurley v. Kincaid*, 285 U. S. 95. This liability would greatly embarrass the construction of a national flood control system since it frequently becomes necessary to modify a proposed floodway project in the light of further experience. See Supplemental Brief for petitioner in *United States v. Sponenbarger*, No. 72, this Term. If, for example, after commencing construction on the Birds Point-New Madrid floodway project the Government had shifted the line of the set-back levee (as it could have done without any amendment of the act), so that the petitioner's land would not be included in the floodway, the Government would nevertheless under petitioner's theory be liable to compensate him for a flowage easement, even though his land would no longer be in the floodway. This cannot be the law: the absurdity of such a result points strongly to the conclusion that no taking occurred on October 21, 1929.

**B. THERE WAS NO TAKING ON THE DATE THE SET-BACK LEVEE
WAS VIRTUALLY COMPLETED**

It has been shown that on October 21, 1929, when construction was begun on the set-back levee, nothing had been done which constituted a taking. On October 31, 1932, the set-back levee was 98.9%

completed; only the gap where the Missouri Pacific Railroad crossed near Samos had not been closed (R. 195). The record does not show the progress of the work between these two dates, but this is immaterial since, as will be shown, no taking had occurred even on the later date.

1. *Nothing had been done to increase the possibility of the overflow.*—So far as the possibility of overflow is concerned, the situation on October 31, 1932, was identical with that on October 21, 1929 (see pp. 23–24, *supra*). The upper fuse-plug section, which was designed to divert water to the floodway when the river reached a 55-foot stage, had not been reduced, the riverside levee had not been altered (R. 111), and it is clear from the record that the existence of the set-back levee would not affect the frequency of flooding (R. 190).

It has been shown, furthermore (p. 24, *supra*), that under section 1 of the Flood Control Act nothing could be done which would subject petitioner's land to more frequent overflow until the floodway was completed. On October 31, 1932, it had not been completed. Although mathematically 98.9% of the work on the set-back levee had been done, the completion of physical construction is not the only element prerequisite to the completion of the floodway. Section 4 of the Flood Control Act provides that the United States shall acquire flowage rights for additional destructive waters which will pass by reason of diversions from the main channel of the Mississippi River.

The only reasonable interpretation that can be placed on the proviso in section 1, read together with section 4,¹² is that flood protection cannot be

¹² After the bill (S. 3740) which became the Flood Control Act had undergone lengthy debate in the House of Representatives, Congressman Reid, Chairman of the Flood Control Committee of the House of Representatives, then stated with reference to section 4, as it then stood, that he would not support a bill which would permit the flooding of the floodways "*without first acquiring the right-of-way or the flowage rights*" (69 Cong. Rec. 7000).

The next day he proposed the following amendment to section 4:

"The United States shall provide flowage rights for destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River and shall control, confine, and regulate such diversion" (*id.* p. 7104). The first part of this amendment differs from the provisions of section 4 of the Act in that it does not contain the word "additional."

Majority Leader Tilson opposed this proposed amendment because he understood it to mean that "we shall simply buy the flowage rights *in advance*" (*id.* p. 7105). Congressman Reid said that he would insist on the amendment because he was opposed to giving the landowners only a law suit (*id.* 7105), and stated (*id.* 7106) that he understood the amendment to mean that "no water shall be turned from the main channel of the Mississippi River *until* the United States acquires the flowage rights." Thus both sides understood that this amendment to section 4 would require the acquisition of flowage rights in advance. [Italics supplied throughout.]

Congressman Tilson in opposing this amendment offered his own (*id.* 7104) which read as follows: "Any property taken by the United States for the purpose of carrying out the terms of this Act for which compensation is required by the Constitution of the United States shall be paid for by the United States." This provision had been passed upon by the Attorney General (*id.* 7108) and represented the

lessened until both construction is completed and the necessary flowage rights are acquired. This is the interpretation of section 1 adopted by the War Department (*R.* 198); *Matthews v. United States*, 87 C. Cls. 662, 680, 700 (1938).¹³ It is also significant that following the 1937 flood the crevassed riverside levee was restored by the War Department to its previous height (*R.* 200).

2. *There is no taking because the set-back levee would confine the floodwaters.*—There was testimony that the completed set-back levee would increase the depth, duration, and velocity of overflow by confining to the floodway waters which would otherwise pass to the west (*R.* 190–191). It would, however, serve only to confine waters which had already overtopped the unreduced riverside levee and that would not constitute a taking, but merely consequential damage. *Hughes v. United States*, 230 U. S. 24; *Sanguinetti v. United States*, 264

Administration's viewpoint. Notwithstanding the fact, the Tilson amendment was rejected and the Reid amendment to section 4 accepted (*id.* 7111). This legislative history clearly shows that Congress intended that the flowage easements be acquired in advance.

¹³ Compare the language in *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.), app. dism. upon stip., 64 F. 2d 1015 (C. C. A. 8): "The court ought not, and will not, anticipate that defendants in the future, without instituting and prosecuting a condemnation proceeding in the manner provided by law, will appropriate plaintiff's property by removing any part of the present levee along the west bank of the Mississippi River, and thereby flood plaintiff's land. *Oregon v. Hitchcock*, 202 U. S. 60, 26 S. Ct. 568, 50 L. Ed. 935."

U. S. 146; *Jackson v. United States*, 230 U. S. 1; *Bedford v. United States*, 192 U. S. 217; *Gibson v. United States*, 166 U. S. 269; *Christman v. United States*, 74 F. 2d 112 (C. C. A. 7); *Kirk v. Good*, 13 F. Supp. 1020 (E. D. Mo.), appeal dismissed upon stipulation, 64 F. 2d 1015 (C. C. A. 8). Thus, in the *Matthews* case, the court said (p. 719):

The construction by the United States of a second or set-back levee, so as to confine any floodwaters in a specified area, was not alone a taking of any property or property rights. The construction of such levee was clearly in the exercise of a lawful power and any increased costs to plaintiff in the operations of a business or in the exploitation of his timber, or any depreciation in the value of his property because of such anticipated increased costs of carrying on operations over the set-back levee are consequential damages for which no recovery can be had under the Fifth Amendment. [Italics supplied.]

The Constitution, therefore, would impose no liability on the Government.

Nor would section 4 of the Flood Control Act apply before reduction in height of the riverside levee. It requires the United States to provide flowage easements only "for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River." The Act, which in any event is simply a direction to Government officers, thus contemplates the ac-

quisition of flowage easements only for additional waters which the floodway projects will divert into the floodway from the river. See Brief for Petitioner in *United States v. Sponenbarger*, No. 72, this Term, pp. 62-76. The Birds Point-New Madrid project will not divert additional water from the river until the fuse-plug section has been reduced below 58 feet. This is the interpretation placed upon section 4 of the Act by the Court of Claims. It said in the *Matthews* case (p. 705):

It is only floods between 55 and 58 feet on the Cairo gauge that will be diverted "from the main channel of the Mississippi River," and this "diversion" will be due to the reduction in such protection as existed at the time of institution of this suit at 58 feet and establishing the same at 55 feet on the Cairo gauge.

One of the petitioner's witnesses estimated that the confining effect of the completed set-back levee would have increased the depth of the 1913 flood on the petitioner's land by three to four feet and of the 1937 flood by five to six feet. The witness also said the duration and velocity of the overflow would be increased, but did not estimate the extent of such increase. He further testified, in general terms, that increases in depth and velocity would result in increased damage to buildings, but did not state how much of an increase in damage there would be (R. 190-192). There is no other evidence in the record as to the effect of the set-back levee alone.

It is plainly insufficient to show that there has now been a taking because of construction of the set-back levee.¹⁴

3. *The Sponenbarger and Matthews Cases.* The reasoning of the majority of the court below in *Sponenbarger v. United States*, 101 F. 2d 506, certiorari granted, No. 72, this Term, is not easy to reconcile with that of the same court (with different judges sitting) in this case. As pointed out in our brief in opposition (pp. 11-12) the cases are not in necessary conflict because of the factual assumptions made in the *Sponenbarger* opinion. But in that case the majority of the court held, *inter alia*: (1) the Boeuf floodway (although abandoned by Act of Congress), must be held to be in operative condition because the Jadwin Plan as a whole was about 90 percent complete; (2) Federal control over the fuse-plug levees had been asserted,

¹⁴ We need not rely on the fact that when the case was tried below, the set-back levee was only 98.9 percent completed. But it may be noted that there was then a gap in the set-back levee where the railroad went through to Samos (R. 195). The railroad embankment extended from this gap southeastward to Crosno. Headwaters from the north would be retained by the embankment (R. 192) and would obviously pass out of this gap. The force of the water passing through the gap would be likely rapidly to enlarge the opening by tearing away the exposed sides of the set-back levee. (Compare the origin and operation of Natural Crevasse No. 4 (R. 192) and see *Matthews* opinion, pp. 703 and 717; 2 Elliott, *The Improvement of the Lower Mississippi for Flood Control and Navigation* (1932), pp. 197-201.) This would largely reduce the confining effect of the set-back levee as it existed on October 31, 1932.

apparently because it was so recommended in the Jadwin Report. The court reached contrary conclusions on these points in this case. For statistical purposes, it may be noted that in the Eighth Circuit three circuit judges and two district judges (one sitting as a circuit judge) agree with the Government; two circuit judges differ.

Apart from these factors, the *Sponenbarger* decision seems to have turned largely upon the court's view—contradicted both by the unreversed findings of fact by the district court and by the facts of judicial notice—that the certainty and violence of flooding had been increased by virtue of what the court viewed as an “operative” fuse-plug. The equivalent situation in the case at bar will not arise until the fuse-plug section can be and is reduced, in accordance with the provisions of the Act.¹⁵

The Government's contention that there was no taking on October 31, 1932, finds complete support in the decision of the Court of Claims in *Matthews*

¹⁵ *United States v. Yazoo & M. V. R. Co.*, 4 F. Supp. 366 (E. D. La.), reversed and remanded by the circuit court of appeals *per curiam*, upon stipulation, 67 F. 2d 1019 (C. C. A. 5), which is relied upon by the petitioner (Br. 24) is not in point because (1) the court erroneously held that the order of immediate possession obtained pursuant to 33 U. S. C. sec. 594 vested title in the United States, (2) the Bonnet Carre project was a controlled spillway (H. Doc. 90, 70th Cong., 1st sess. (1927), p. 7) and not a fuse-plug project, and (3) the spillway was on the east bank and therefore expressly excluded from the restrictive proviso in section 1 of the Flood Control Act (see p. 45, *infra*).

v. *United States*, 87 C. Cls. 662. The facts in that case and in the case at bar are almost identical. Matthews filed suit in the Court of Claims to recover just compensation for an alleged taking of flowage rights over land situated in the Birds Point-New Madrid Floodway (p. 663).¹⁶ The northern boundary of the Matthews property is a little more than a mile south of the southern line of the parcel involved in this proceeding. At the time of the Matthews suit the set-back levee had been completed except for the closing of the gap where the right-of-way of the Missouri Pacific Railway intercepts and passes through the levee (p. 684). The court held that the construction of the set-back levee so as to confine floodwaters did not constitute a taking of land in the floodway (pp. 715, 719) and that the provision for the reduction of the riverside levee at some future time was not a taking (p. 715).

The petitioner seeks to distinguish the *Matthews* decision (Br. 33-34) on the ground that the greater part of the land involved in that case was in the backwater area¹⁷ while in this case the greater part

¹⁶ Subsequent to filing of the suit in the Court of Claims the Government instituted proceedings to condemn a flowage easement over the Matthews tract (p. 666), but these proceedings were stayed because of the litigation in the Court of Claims and have recently been dismissed on motion of the Government (Law No. 706, E. D. Mo., S. E. Div.).

¹⁷ When the river attains a stage of 55 feet on the Cairo gauge, floodwater backs up from the south and overflows lands which have an elevation of 300 feet Mean Gulf Level or less. (R. 111).

is above backwater. This was not the basis of the decision of the Court of Claims,¹⁸ nor could it have been since 245 acres of the Matthews land were above backwater.

4. *The implications of petitioner's position.*—

The enormous scope and necessarily great cost of the Government's flood-control program is well known. If this Court were to hold that a taking occurred on October 31, 1932, or prior thereto, the Government would seem to be liable for interest on all future awards for flowage rights in the proposed floodways without regard to the fact that years might elapse before anything was done to increase the flood hazard. Although, except for this case, flowage rights have been acquired throughout the Birds Point floodway,¹⁹ this is not the case in the Morganza, the west Atchafalaya, and the proposed Eudora floodways.²⁰ The application of the principle urged by petitioner might result in adding millions of dollars to the cost of the flood control program.

¹⁸ The situation in the two cases is the same, in any event, for even if there had been no floodway both tracts would have been flooded, one by backwater, the other by headwater. As pointed out in *United States v. Cress*, 243 U. S. 316, 328, there is no difference in kind.

¹⁹ See 1938 Annual Report of Chief of Engineers, p. 2086, and footnote 16, *supra*, p. 38.

²⁰ See Supplemental Brief for petitioner in *United States v. Sponenbarger*, No. 72, this Term, pp. 18-20.

C. THE ACTS OF ARMY OFFICERS DURING THE 1937 FLOOD EMERGENCY

Between October 31, 1932, and April 23, 1937, when judgment was entered, there was no change in the factual situation except for a brief interval in January of 1937 when a flood occurred which was unprecedented in the history of the Mississippi River in this stretch (R. 191). It is difficult to tell whether petitioner contends that certain acts of army officers at that time constituted a taking (Br. 16, cf. 27) or merely indicated that the Government believed that it had the right to place the floodway in operation (Br. 27; see opinion below, R. 238).

As the flood approached its crest Colonel Reybold, the officer in charge of Engineer District No. 1 at Memphis, directed Major Burdick to proceed to the area and place the Birds Point-New Madrid Floodway in operation (R. 196-199). These orders were issued by him upon his own initiative, since he had received no instructions from any of his superiors (R. 200). The orders, however wise or necessary in view of the danger to Cairo, and their execution by his subordinate, were, as the court of appeals held (R. 238), in violation of the mandate of Congress: the dynamiting of three portions of the upper fuse-plug reduced the flood protection afforded by the levee on the west side of the river, and this was prohibited by section 1 of the Flood Control Act since the floodway had

not been completed.²¹ After the flood subsided the Chief of Engineers recognized, in effect, that the artificial crevassing of the riverside levee had been done without authority when he issued instructions to Colonel Reybold to restore the levee to its previous height (R. 200).

It is clear that no taking can be predicated upon these unauthorized acts of Government officers. *Hooe v. United States*, 218 U. S. 322; *Hughes v. United States*, 230 U. S. 24. In the latter case the Supreme Court held that if the act of an officer of the United States in dynamiting a levee in an emergency was wrongful, it was not the act of the United States and did not amount to a taking of the property overflowed as a result of the dynamiting.

Since the acts of the army officers were unauthorized and a violation of the Flood Control Act they are plainly not indicative, as petitioner suggests, that the Government believed that it had the right to place the floodway in operation. It is evident that the Government took the contrary view because the dynamited portions of the levee were restored to their previous height (R. 200). Furthermore, little importance can be attached to those acts since as the court of appeals recognized (R.

²¹ It has been shown (pp. 31-33, *supra*), that the Flood Control Act prohibited the reduction of the riverside levee on October 31, 1932, because construction work had not been completed and the necessary flowage easements had not been obtained. The situation at the time of the dynamiting in January of 1937 was exactly the same.

238) "they were done in the midst of the pressing emergency and at a time when the appellant's land was subject to an inevitable overflow."

It is clear from the record, moreover, that the project did not cause the overflow of petitioner's property. Prior to 1937 all major floods had inundated his land and the 1937 flood was the greatest in history (R. 112, 191). It is undisputed that even with extraordinary high water maintenance the 1937 flood would have overtopped the river-side levee and overflowed the Danforth land (R. 190-191, 193). The landowner's expert witness testified that water from Natural Crevasse No. 1 was the first to enter the floodway (R. 192). It was also the first to overflow the petitioner's land since the southward flow from the artificial crevasses was retarded by O'Bryan's Ridge and the railroad embankment (R. 193). The same witness also stated that the volume of flow from the natural crevasses exceeded that from the artificial crevasses (R. 193). Since the petitioner's land would have been overflowed during the 1937 flood regardless of the project, clearly no taking occurred at that time.

D. THE ENTRY OF JUDGMENT

There was, therefore, no taking before the entry of judgment. The entry of judgment did not constitute a taking. *Barnidge v. United States*, 101 F. 2d 295, 298 (C. C. A. 8); *Kanakanui v. United States*, 244 Fed. 923 (C. C. A. 9); *Johnson &*

Wimsatt v. Reichelderfer, 66 F. 2d 217 (App. D. C.); *Miller v. United States*, 57 F. 2d 424 (App. D. C.); *District of Columbia v. Hess*, 35 App. D. C. 38. Since the fuse-plug section cannot be reduced until the necessary flowage easements are acquired, no taking will occur until the judgment is paid.

CONCLUSION

Since the district court did not have jurisdiction to adjudicate petitioner's contract claim and since there has as yet been no taking of a flowage easement over petitioner's land, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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OCTOBER 1939.

APPENDIX

ACT OF MARCH 3, 1797, C. 20, 1 STAT. 514; R. S. SEC. 951, AS AMENDED (28 U. S. C. SEC. 774)

In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or by some unavoidable accident.

THE MISSISSIPPI RIVER FLOOD CONTROL ACT

(ACT OF MAY 15, 1928, C. 569, 45 STAT. 534; 33 U. S. C. SECS. 702A-702M)

AN ACT For the control of floods on the Mississippi River and its tributaries, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers

to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: * * * *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act except section 13.

* * *
 SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the

construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property, such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of ~~War~~ may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War, is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land required under the provisions of this section shall be turned over

without cost to the ownership of States or local interests.

* * * * *

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

* * * * *

SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

* * * * *

Approved, May 15, 1928.

SUPREME COURT OF THE UNITED STATES.

No. 309.—OCTOBER TERM, 1939.

William H. Danforth, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Eighth
Circuit.

[December 4, 1939.]

Mr. Justice REED delivered the opinion of the Court.

A writ of certiorari was granted¹ to review the judgment of the Court of Appeals for the Eighth Circuit² affirming a judgment of the District Court for the Eastern District of Missouri which awarded to a property owner, against the United States, compensation in condemnation less in amount than a sum fixed by an arrangement between the parties prior to the institution of the condemnation. This judgment provided for payment of the award into the registry of the court and that upon such payment the United States should be entitled to the relief sought. Although the issue was raised by the landowner, no provision was made as to interest. The writ was granted to determine important questions of federal law as to the effect in condemnation, of prior agreements by the United States as to the amount of awards and as to the running of interest.

This proceeding arose in the course of carrying out the protection from destructive floods of the alluvial valley of the Mississippi between Cape Girardeau, Missouri, and Head of Passes, Louisiana. This work of internal improvement was begun under the Flood Control Act of May 15, 1928.³ The passage of this act followed the disastrous experience with the flood of 1927 and was based upon a comprehensive report and plan known as the Jadwin Plan, Major General Edgar Jadwin, then Chief of Engineers of the United States Army, being in charge of its development.⁴ The plan covers the great alluvial valley of the Mississippi through its entire length from the Ohio to the delta. In essence, the plan in its entirety is based upon a levee system which constricts the water to a moderate

¹ 308 U. S. —.

² 102 F. (2d) 5, 105 F. (2d) 318.

³ 45 Stat. 534, 33 U. S. C. § 702a-702m.

⁴ The plan is found in "Flood Control in the Mississippi Valley," H. R. Doc. No. 90, 70th Cong., 1st Sess. Reference is also made in the Flood Control Act to a plan recommended by the Mississippi River Commission and authority is granted to adjust the engineering differences between the two plans.

degree and allows in periods of extreme floods the escape from some lower levees, known as fuse-plugs, of the water from the main channel to back waters and floodways.

The particular portion of the plan involved here is known as the Birds Point-New Madrid Floodway. Prior to the passage of the Flood Control Act, there were levees along the west bank of the Mississippi between Birds Point, Missouri, and New Madrid, Missouri, which substantially followed the meanderings of the river. To get a greater area for the spreading of flood waters, the plan provided for a second levee to be set back about five miles from the riverbank levee running from Birds Point to St. Johns Bayou, just east of New Madrid. Near its upstream connection with the set-back levee the present riverbank levee would be lowered some five feet by what is called a fuse-plug, so that at high flood the water will begin to flow into the wide floodway below. It is expected that this enlarged channel will keep anticipated floods from rising above the levees protecting Cairo, Illinois. The set-back levee will confine its diverted water to the floodway area between the set-back levee and the riverside levee and will return the water to the Mississippi through a lower fuse-plug section where a gap is left in the levee system to permit complete drainage. The land involved in this condemnation is situated in this floodway immediately east of the set-back levee and about midway between Birds Point and New Madrid.

The Flood Control Act stipulates that the United States "shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River." The same section authorizes the Secretary of War to "cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which . . . are needed in carrying out this project. . . ." Jurisdiction of the proceeding is given to the United States district court for the district in which the property is located. Commissioners were authorized to view and value. It was further provided: "When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; . . ."

There is the additional provision in Section 1 of this same Act that "pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree

of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway."

Construction work began on the set-back levee on October 21, 1929, and was substantially complete on October 31, 1932. The riverside levee is maintained at its original height of about 58 feet and the upper fuse-plug, which is designed to admit water into the floodway, has not yet been created.

In January, 1937, the Mississippi River attained its highest flood stage in recorded history. Late in that month the United States Army officer in charge of Memphis Engineers, District No. 1, directed a subordinate to proceed to the area and place the Birds Point-New Madrid Floodway in operation. These instructions were issued by the officer in charge of the district without orders from any superior. The directions were carried out after flood waters were trickling over the riverside levee into the floodway area through a natural crevasse and when pursuant to these orders an artificial crevasse was created by dynamiting the northern portion of the upper fuse-plug section. Later another artificial crevasse was created and other natural crevasses developed. Through these crevasses petitioner's land was flooded. As the river would have reached a stage sufficiently high to overtop the riverside levee, even with extraordinary high-water maintenance, the land of the petitioner would have been flooded without the crevasing. The set-back levee did confine the diverted water to the floodway. It increased its depth and destructiveness on petitioner's land. After the flood subsided, the riverside levee, including the upper fuse-plug section, was restored to its previous height.

Prior to the institution of this action, orders had been issued by the Secretary of War, under the provisions of Section 4 of the Flood Control Act, to purchase this tract of land. A letter containing the offer for the flowage rights here involved, dated January 14, 1932, had been received by the petitioner and the offer accepted by him within an agreed extension of the limited time. The letter, so far as pertinent, reads as follows:

"2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 88/100—Dollars (\$31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed

verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses."

After its acceptance, there was an attempted withdrawal of this offer by a letter of July 8, 1932, which advised the owner that "after a careful review of the question of flowage over these tracts it was found by higher authority that the prices first suggested could not be properly recommended to the Court."

After this letter, a petition was filed by the United States to condemn over the land here in question a perpetual right, power easement, and privilege to overflow, as contemplated by said project and described in House Document 90. After the appointment and report of the commissioners for the determination of an award, petitioner filed an answer and counterclaim. In the answer he set up that prior to the filing of the suit a "written offer of settlement for the damages and for the purchase of an easement" for floodway purposes was made by the United States and accepted by petitioner. Petitioner further alleged an offer of title to the easement sought and a request for the payment of the agreed sum. Judgment against the United States was asked in that amount, "with interest," to be paid into court for the benefit of the defendants, in accordance with their respective rights and against the defendants for the perpetual flowage easements "upon payment into Court" of the agreed sum. Changing the designation of the pleading from answer to counterclaim, these allegations were repeated as a counterclaim. The Court sustained a motion of the United States to strike this answer and counterclaim on the ground that the petitioner had waived his rights under the written agreement because of his failure to plead them prior to the entry of the interlocutory order allowing the condemnation and appointing commissioners. Subsequently the reports of the first and second commissions appointed to view the property were set aside for reasons which are immaterial here. To the report of the third commission, awarding \$17,921.70, the petitioner renewed the objection that the agreement between the United States and him was decisive in fixing the award at \$31,681.98; asked for interest "from such time as the Court may find that plaintiff [the United States] appropriated the flowage easement in question" and sought new viewers to determine the award as claimed by petitioners or in the alternative that the Court enter judgment for the sum claimed with appropriate terms to create the flowage easement in the United States.

Upon this exception a hearing was had and findings and judgment entered confirming this report and adjudging the condemnor the easement sought upon payment of the award. Nothing appeared in the order as to interest. By assignments of error on appeal to the Court of Appeals and in the statement of questions involved and reasons for granting the writ of certiorari, petitioner has preserved the issues of his right to an award in the agreed amount and to interest from the date found to mark the taking from him of the land.

Determination of Value.—By answer and exception to the report of the commissioners, the petitioner pleaded the agreement on the value of the easement evidenced by the letter and acceptance referred to above. The Government contends that the "relevance of the contract . . . as a measure of the value of the easement is not in issue; the petitioner pitches his case solely on the proposition that he can enforce the contract." With this contention we do not agree. In the answer, it is true judgment is prayed against the United States for the agreed amount. But a judgment is offered to the United States for the perpetual flowage easement upon payment of the sum into court. In the objection to the commissioners' report the prayer is for entry of a judgment in the agreed sum "and upon payment of the same that the Court decree an appropriate judgment in favor of plaintiff for the said easement." We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. Paragraph 3 of the letter shows condemnation was in mind.

This action is brought under the provisions of Section 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act⁶ or the general statute on condemnation.⁷ We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title.⁸ In dealing with a stipulation to waive a requirement of filing a claim for tax refund

⁶ Judicial Code § 24(20), 28 U. S. C. § 41(20).

⁷ 25 Stat. 357.

⁸ Cf. Wachovia Bank & Trust Co. v. United States, 98 F. (2d) 609 (C. C. A. 4th).

with the Commissioner of Internal Revenue, we held such waiver enforceable in the face of a statutory requirement for such filing.⁹ The convenience of preparation for trial and the interest of orderly procedure was decisive there. Here the same reasons with the supporting language as to the power of purchase leads to the conclusion that the trial court erred in striking the answer and refusing the motion to determine the value at the agreed price.¹⁰ We need not consider the counterclaim as the answer covers the entire subject of the determination of value.

Interest.—Petitioner seeks interest on the judgment from the time of the taking or appropriation of the flowage easement. Petitioner fixes this appropriation at the time of the enactment of the Flood Control Act of May 15, 1928, on the theory that the passage of that act diminished immediately the value of this property because the plan contemplated the ultimate use of the floodway. Alternatively the date of the taking is fixed by petitioner as of October 21, 1929, when work began on the set-back levee or October 31, 1932, when the set-back levee was completed.

There is no disagreement in principle. Just compensation is value at the time of the taking. The Congress, in other situations, has adopted the time of taking as the date for determination of value.¹¹ For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.¹² Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action,¹³ we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award. Until taking, the condemnor may discontinue or abandon his effort.¹⁴ The deter-

⁹ *Tucker v. Alexander*, 275 U. S. 228.

¹⁰ *Cf. Judson v. United States*, 120 Fed. 637 (C. C. A. 2d) (U. S. District Attorney's agreement to submit matter of damages to arbitration, in condemnation, in accordance with the state statute is binding).

¹¹ 46 Stat. 1421; 47 Stat. 722, § 305.

¹² *Kindred v. Union Pacific R. R.*, 225 U. S. 582, 597; in *Roberts v. Northern Pacific*, 158 U. S. 1, 10, the precedents are collected.

¹³ See various statutory means of determining the time of taking in *Nichols, The Law of Eminent Domain*, 1917, section 436.

¹⁴ See *Bauman v. Ross*, 167 U. S. 548, 598, 599, where there was a statutory provision relating to condemnation for streets in the District of Columbia which made the failure of the Congress to appropriate, after six months in session, for the payment of the award of damages an event which terminated the pro-

mination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources.¹⁵ Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid.

"¹⁶ A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

In *Brown v. United States*¹⁷ this Court had occasion to consider whether interest should be allowed on the value of the property from the date of summons, the day fixed by the state statute to determine compensation and damages. In that case condemnation proceeded under the federal conformity statute which directs federal courts to conform to state practice and procedure, "as near as may be."¹⁸ Interest, it was thought, was not governed by the conformity act,¹⁹ but should be allowed in accordance with the state law from the date of summons. This conclusion flowed from the acceptance by this Court, without question, of the day of summons as the date for the determination of value, the day of taking.²⁰ Here proceedings are under a Flood Control Act prescribing jurisdiction and procedure. Where the condemnation is free from statu-

ceedings. "This provision," this Court said, "secures the owners from being compelled to part with their lands without receiving just compensation, and is within the constitutional authority of the legislature." "The Constitution does not require the damages to be actually paid at any earlier time nor is the owner of the land entitled to interest pending the proceedings."

Cf. *Kanakanui v. United States*, 244 Fed. 923 (C. C. A. 9th); *Johnson & Wimsatt v. Reichelderfer*, 66 F. (2d) 217 (App. D. C.); *Barnedge v. United States*, 101 F. (2d) 295, 298 (C. C. A. 8th).

¹⁵ See Lewis, Law of Eminent Domain, 3rd Ed., section 955.

¹⁶ *Hanson & Co. v. United States*, 261 U. S. 581, 587.

¹⁷ 263 U. S. 78, 84 *et seq.*

¹⁸ 25 Stat. 357.

¹⁹ 263 U. S. at 87.

²⁰ 263 U. S. at 85-86: "In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damage arising from the inability to sell or lease after the blight of the summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings." At p. 87: "But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take

tory direction, as here, there would be no interest before the taking.²¹

This leaves for consideration the contention that there was a taking by the enactment of the legislation, when work began on the set-back levee or when that levee was completed. The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.²²

For completion of the set-back levee to amount to a taking, it must result in an appropriation of the property to the uses of the Government.²³ This levee is substantially complete. The Government has condemned the land upon which the set-back is built. The tract now in litigation lies between the set-back and riverbank levees. The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The riverbank levee at the fuse-plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking. We agree with the Court of Appeals that this is "an incidental consequence" of the building of the set-back levee.²⁴ Nor can we conclude that a taking occurred through the act of the Army officers in dynamiting the levee during the emergency of the 1937 flood. It was restored to its previous height. Up until this time, the plan for a fuse-plug to permit the escape of destructive flood waters was not in effect. Indeed, the petitioner disclaims any contention that the crevassing of the levee by the Government was a taking. The taking, he urges, took place before and this use is only evidence of the control obtained by the prior taking.

Reversed in part and affirmed in part.

possession, interest allowed from the date of the summons is not a provision making for just compensation."

²¹ *Shoemaker v. United States*, 147 U. S. 282, 321.

²² *Willink v. United States*, 240 U. S. 572; *Bauman v. Ross*, 167 U. S. 548, 596; *United States v. Sponenbarger*, this day decided.

²³ Obviously if there was not a taking at the completion of the set-back levee, there could not be a taking by the beginning of construction.

²⁴ Compare *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Sanguinetti v. United States*, 264 U. S. 146.

MICRO CARD

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